98-310

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

THE STATE INSURANCE FUND,

Petitioner,

vs.

KENNETH G.M. MATHER, TRUSTEE for the ESTATE OF SOUTHERN STAR FOODS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 507(a)(4) of the Bankruptcy Code gives a priority to claims for "contributions" to a debtor's "employee benefit plan." Debtor Southern Star Foods, Inc. provided workers' compensation benefits to its employees by procuring workers' compensation insurance from the State Insurance Fund, but failed to pay all insurance premiums incurred within the applicable statutory time period. Does the insurance that Southern Star procured for its employees constitute an employee benefit plan such that the Fund's claim for unpaid premiums is entitled to priority status under section 507(a)(4)?

STATEMENT PURSUANT TO RULE 29.6

Petitioner the State Insurance Fund has no parent company and no subsidiaries.

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STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on May 21, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1996).

STATUTORY PROVISIONS INVOLVED

Sections 507(a)(3) and (a)(4) of Title 11 of the United States Code provide as follows:

> (a) The following expenses and claims have priority in the following order:
>
> . . .
>
> (3) Third, allowed unsecured claims, but only to the extent of $4,000 for each individual or corporation, as the case may be, earned within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for —

> (A) wages, salaries or commissions, including vacation, severance, and sick leave pay earned by an individual; . . .
>
> (4) Fourth, allowed unsecured claims for contributions to an employee benefit plan —
>
> (A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only
>
> (B) for each such plan, to the extent of —
>
> (i) the number of employees covered by each such plan multiplied by $4,000[1]; less
>
> (ii) the aggregate amount paid to such employees under Paragraph (3) of this sub-section plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

STATEMENT OF THE CASE

A. Introduction

This case presents an important issue of unsettled federal bankruptcy law which has not previously been before this Court, namely, whether an insurer's claim against a debtor for unpaid workers' compensation insurance premiums is entitled to

1. Prior to October 22, 1994, this number was $2,000.

priority status under section 507(a)(4) of the Bankruptcy Code as a "contribution" to an "employee benefit plan." Resolution of this issue will have far-reaching ramifications for workers, employers and insurers. Virtually all fifty states have some type of mandatory workers' compensation system to protect workers injured on the job. Much of that protection is provided through workers' compensation insurance. Accordingly, as employers continue to suffer financial difficulties and seek the protection of the Bankruptcy Code, issues regarding the priority to be granted to workers' compensation insurers' claims will continually arise.

At present, there is no clear answer regarding how these claims should be treated. The United States courts of appeal which have considered this issue are divided; consequently, so are the many federal district and bankruptcy courts which have considered the issue. This results in similarly situated creditors being treated very differently in courts across the country, which violates the fundamental goal of the Bankruptcy Code to treat creditors equally. This division between the courts regarding the meaning of section 507(a)(4) also affects other frequently occurring issues, such as whether insurers' claims for premiums for health and life insurance are entitled to priority. The time has come for this Court to set a clear precedent on this issue.

This conflict affects far more than the insurance industry, it also affects the thousands of laborers whose employers provide them with insurance coverage. If an employer does not maintain that insurance by paying premiums as they become due, employees are (in most states) left completely unprotected if they become ill or are injured on the job, because in bankruptcy there may be no other source from which they can collect benefits. By paying premiums the employer secures for its employees the benefit of insurance for workplace illness or injury without regard to fault. The presence of a workers'

compensation insurance premium priority will — like all other employee benefit priorities — encourage insurance carriers to continue to do business with financially troubled employers, enabling them to retain employees and perhaps even avoid bankruptcy. Because of the importance of this issue, and the lack of uniformity in the application of section 507(a)(4), this Court should take this opportunity to settle these issues and interpret this statute.

In addition, this Court's guidance is particularly necessary due to the genesis of the statute in question. Section 507(a)(4) was enacted in direct response to the previous decisions of this Court in *United States v. Embassy Restaurant*, 359 U.S. 29 (1959), and *Joint Indus. Board v. United States*, 391 U.S. 224 (1968). According to legislative history, Congress intended to overrule the *Embassy* decision. In *Embassy*, this Court held that fringe benefits were not entitled to priority treatment as wages under section 507(a)(3) of the Code. In enacting section 507(a)(4), Congress chose to expand the priority and ensure protection for non-wage benefits such as insurance.

Because the statute affected and changed prior precedents of this Court, it is particularly important that the Court now take the opportunity to speak on this issue again. An interpretation of the statute from this Court will clarify its scope and its effect, and will serve to reestablish needed precedent in this formerly settled area of law.

B. Statement of Facts

Because the parties entered a Stipulation of Facts for Trial, filed July 19, 1996, none of the facts relevant to this case are in dispute. Debtor Southern Star Foods, Inc. contracted with the Fund for workers' compensation insurance coverage for the period between February 1, 1994, and November 17, 1994.

On November 17, 1994, Southern Star's workers' compensation insurance was canceled for non-payment of premiums. The parties stipulated that when the insurance was canceled, Southern Star owed the Fund $230,849.99 in unpaid premiums.

On December 23, 1994, several of Southern Star's creditors filed a petition for involuntary bankruptcy against it, under Chapter 7 of the Code. Pursuant to section 507(a)(4), to qualify for priority, a claim must have been incurred within 180 days of: (1) the petition date; or (2) the date the debtor ceases business, whichever occurs first. The parties have stipulated that $186,898.27 of the Fund's claim was incurred within this statutory time period, and that the amount of that portion of the claim is within the limits of subsection (B) of 507(a)(4). This is the only portion of the claim at issue.

C. Course of Proceedings.

The Fund timely filed a proof of claim in the bankruptcy case, asserting a priority, unsecured claim for unpaid workers' compensation insurance premiums. The Trustee objected, asserting that the claim was not entitled to priority, and requesting that the bankruptcy court allow the claim only as a general, unsecured claim. On October 10, 1996, the bankruptcy court entered an order sustaining the Trustee's objection and allowing the Fund's entire claim only as a general, unsecured claim. The basis for the bankruptcy court's jurisdiction over this claim was 28 U.S.C. § 157(b)(2)(A), (B), (O) (1996).

The Fund appealed the order, and the Bankruptcy Appellate Panel for the Tenth Circuit upheld the bankruptcy court on July 28, 1997. The Fund appealed this order as well, and on May 21, 1998, the United States Court of Appeals for the Tenth Circuit affirmed the Bankruptcy Appellate Panel's decision.

REASONS FOR GRANTING THE WRIT

I.

A CLEAR STATEMENT FROM THIS COURT ON THIS IMPORTANT ISSUE OF FEDERAL LAW IS NECESSARY BECAUSE THE UNITED STATES COURTS OF APPEAL WHICH HAVE CONSIDERED THE ISSUE HAVE REACHED CONFLICTING AND IRRECONCILABLE CONCLUSIONS.

A. The Decisions of the Courts of Appeal are in Direct Conflict.

The courts of appeal which have considered the status of claims for unpaid workers' compensation insurance premiums under the Bankruptcy Code have reached contradictory decisions, and this case presents this Court with the occasion to resolve this conflict and clarify this important and unclear area of law. An examination of these decisions and their underlying rationale illustrates the confusion regarding bankruptcy treatment of claims like the Fund's. The conflicting rationales used by the courts make it completely unclear how a claim for unpaid insurance premiums — whether for workers' compensation coverage or regular health insurance — should be treated under the Bankruptcy Code. One line of authority finds that such claims are clearly entitled to priority based on the plain language of section 507(a)(4), while another line finds they are clearly not entitled to such priority. Some language used by the courts indicates that in order for the claim to have priority, the insurance benefits for which premiums were charged must have been directly bargained-for by the employees they benefit. Still another line holds that claims for unpaid workers' compensation insurance premiums are entitled to priority as an excise tax, but only in certain limited circumstances, when charged by a state fund.

The following cases illustrate the irreconcilable conflict that has arisen between the differing conclusions reached on the application of section 507 by the Fourth, Sixth, Ninth and Tenth Circuit courts of appeal:

- In *Employer's Ins. of Wausau v. Plaid Pantries, Inc.*, the Ninth Circuit found that claims for workers' compensation insurance premiums *are* entitled to priority under § 507(a)(4). *See* 10 F.3d 605 (9th Cir. 1993).

- In *Employer's Ins. of Wausau v. Ramette (In re HLM Corp.)*, the Eighth Circuit found that the claims *are not* entitled to priority under section 507(a)(4), mainly because workers' compensation insurance coverage is mandated by statute. *See* 62 F.3d 224 (8th Cir. 1995). Although the court explicitly limited its holding to claims arising under the Minnesota workers' compensation scheme, courts following this decision routinely apply it without regard to the substance of state laws involved. *See, e.g.* the Tenth Circuit's decision in this case, 144 F.3d at 712.

- In *State Ins. Fund v. Southern Star Foods, Inc.*, the Tenth Circuit followed the erroneous reasoning of the Eighth Circuit and found that claims for workers' compensation insurance premiums *are not* entitled to priority, because, among other reasons, they are not *primarily* for the benefit of the employee. *See* 144 F.3d 712 (10th Cir. 1998).

- In *Yoder v. Ohio Bureau of Workers' Comp. (In re Suburban Motor Freight, Inc.)*, the court was not interpreting section 507(a)(4), but rather section 507(a)(7)(E), which provides priority to excise taxes. The Sixth Circuit found that claims of workers'

compensation insurers are entitled to priority status as an excise tax if they are state run, and if applicable state law requires employers to procure workers' compensation insurance from that entity rather than a private insurer. *See* 618 F.2d 159 (6th Cir. 1993).

- In *New Neighborhoods, Inc. v. West Virginia Workers' Comp. Fund*, the Fourth Circuit agreed with the Sixth Circuit's decision in *Suburban Motor*. *See* 886 F.2d 714 (4th Cir. 1989).

In addition to the conflict regarding the status of claims for workers' compensation insurance premiums, the courts' differing application of section 507 creates confusion about whether claims for any type of insurance premiums, including health insurance premiums, are entitled to a priority. The First Circuit has held that these claims are entitled to priority. *See In re Saco Local Dev. Corp.*, 711 F.2d 441 (1st Cir. 1983). Other courts have held that they are not. *See, e.g., State Ins. Fund v. Kenneth G.M. Mather, Trustee*, 210 B.R. 838 (10th Cir. B.A.P. 1997).[2]

Although *In re Saco* did not deal with workers' compensation insurance premiums, its holding is nevertheless in conflict with the court of appeals' decision in this case and other similar cases because it specifically rejects the argument (adopted by the court in *HLM* and the Tenth Circuit in this case) that in order to be entitled to priority status, a benefit must be a direct wage substitute. *See In re Saco*, 711 F.2d at 449. The *Saco* court found "no merit" in this contention, finding that "[s]uch substitution can normally be assumed, unless the employer is a philanthropist." *Id.* Additionally, with the prospect of mandatory health insurance benefits becoming

2. The Tenth Circuit declined to reach the issue in this case, finding that it was not necessary to reach a decision. *See* 144 F.3d at 717 n.6.

more of a reality, the need for a clear statement on these issues is becoming even more important.

B. The Court of Appeals' Reasoning in these Cases is Inconsistent

Not only have these courts of appeal come to opposite conclusions on the application of section 507, they have done so for different reasons, disagreeing on much of the relevant rationale. A brief examination of a few of these cases illustrates the conflict in the law, and illuminates the reasons this Court needs to address this issue.

1. *The Ninth Circuit View*

The first court of appeals to address the issue presented in this case was the Ninth Circuit, in *Plaid Pantries*. In *Plaid Pantries*, the court read the plain language of section 507(a)(4)'s grant of priority to claims for "contributions" to an "employee benefit plan" to encompass insurance premiums which fund workers' compensation plans established by an employer for the benefit of its employees. 10 F.3d at 605. The *Plaid Pantries* court noted that section 507(a)(4) was specifically added to the Bankruptcy Code in order to provide a level of priority for employee benefits not previously covered, and to overrule two prior cases of the United States Supreme Court[3] which had held that "fringe benefits" were not entitled to priority status. *See* 10 F.3d at 607; *In re Saco,* 711 F.2d at 448.

In analyzing the issue, the court looked to the purpose of the entire workers' compensation system, which is to provide benefits *to employees injured at work. Plaid Pantries*, 10 F.3d at 607 (emphasis added). The court reasoned:

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3. These cases were *United States v. Embassy Restaurants, Inc.*, 359 U.S. 29 (1959), and *Joint Indus. Board v. United States*, 391 U.S. 224 (1968).

> Those benefits are generally funded by insurance, the premiums for the insurance are paid by the employers, and the costs are passed on in the form of lower wages and higher prices. Those benefits are a form of compensation offered to workers in exchange for the labor that they performed. While the insurance is often statutorily — as opposed to contractually — mandated, the workers' compensation system is nonetheless a plan of compensation available to workers, and the employers' payment of insurance premiums fund it.

Id. Because the purpose of subsection (a)(4) is to protect workers' benefit plans, the Ninth Circuit found that the best way to support that goal would be to allow the insurer to obtain its premiums through the priority. *Id.* (citing *In re Saco*, 711 F.2d at 449).

The court specifically rejected the argument that § 507(a)(4) only encompasses benefits that are a direct substitute for the wages given priority under subsection 3 of § 507,[4] noting that subsection 4 was meant to expand the priorities granted under § 507, as opposed to simply substituting them. *Id.* The court also rejected the argument that contributions must be "negotiated," stating:

> We see no reason for concluding that Congress intended to deny priority to workers' compensation benefit plans while granting the same statutory priority to other plans providing benefits to employees. Nor can we conclude that Congress

4. Section 507(a)(3) of the Bankruptcy Code provides third priority to allowed, unsecured claims of the debtor's employees or "wages, salaries, or commissions" earned within 90 days of the bankruptcy filing or the cessation of the debtor's business.

> intended to distinguish between benefit plans that are contractually promised to employees and those that are statutorily required. The purpose of the priority, to protect the solvency of benefit plans, is present in both situations.

Id.

2. *The Eighth Circuit View*

The Ninth Circuit's sound reasoning was squarely rejected by the Eighth Circuit Court of Appeals in the *HLM* case. *See* 62 F.3d 224 (8th Cir. 1995). In *HLM*, the Eighth Circuit agreed with the *Plaid Pantries* court that the language of section 507(a)(4) is unambiguous, but then went on to read it differently. The *HLM* court's decision was based, for the most part, on the fact that employers are required to maintain workers' compensation insurance by statute. Because the insurance is required by statute, the court reasoned, insurance premiums benefit the employer more than the employee, and thus are not a "benefit" which could be the object of a "benefit plan." For the same reason, that court found that payment of premiums was not "voluntary" and that a claim for unpaid insurance premiums is not a claim for a contribution, holding that the term "contribution" implies voluntariness. *Id.* at 226.

Although the *HLM* court noted an irreconcilable conflict between jurisdictions, it is important to note that the holding of *HLM* is specifically limited to claims for unpaid workers' compensation insurance premiums "under Minnesota's workers' compensation scheme. . . ." *Id.* at 227. Thus, although in the case at bar the Tenth Circuit and the BAP adopted the reasoning of the *HLM* case, its holding is actually inapplicable to these facts, because the scheme of workers' compensation under Minnesota law is critically different from the plan for

workers' compensation set forth under Oklahoma law; therefore, insurance is less of a benefit to employees in Minnesota.

In Minnesota, compensation insurance is not crucial to employees. A Minnesota employee injured on the job will always receive benefits, even if the employer is uninsured, because the workers' compensation statutory scheme in Minnesota provides for a special compensation fund for all employees in the state. *HLM*, 165 B.R. 38, 40-41 (Bankr. D. Minn.), *aff'd*, 183 B.R. 852 (D. Minn. 1994). In Oklahoma, however, workers' compensation insurance is a very important benefit, because there is no "special compensation fund." Under the Oklahoma statutory scheme, an employer is statutorily required to carry insurance, to be self-insured, to be part of a group self-insurance association or to obtain an approved workers' compensation equivalent insurance product. 12 Okla. Stat. tit. 85, §§ 61, 65 (Supp. 1997). If an employer fails to comply with the Act, it is subject to severe civil and criminal penalties, an injured employee can sue in district court, and the employer will be estopped from asserting certain defenses. *Id.* §§ 12, 63.1, 63.3 (Supp. 1997). Even so, obtaining a money judgment against an illegally uninsured employer is not necessarily beneficial to an injured employee, because there is no guarantee that the employee would be able to collect any or all of such judgment. On the other hand, if the employer's compensation insurance premiums are paid, so that the insurance remains in force, the employee may proceed to collect his money directly from the insurer. *Id.* § 12 (1991).

Because injured workers in Minnesota are taken care of regardless of whether their employer pays their workers' compensation insurance premiums, the insurance is less important, and not as much of a "benefit" to employees in Minnesota. This legal distinction changes the fundamental

nature of the insurance carrier's position as a claimant under section 507(a)(4). Nevertheless, in this case, the Tenth Circuit ignored this distinction between Oklahoma and Minnesota law, and found *HLM* persuasive. *See* 144 F.3d at 715 n.5. Similarly, other courts following the HLM decision have done so without regard for that distinction, and have applied the rule to insurers in states with workers' compensation systems similar to Oklahoma's. *See, e.g., In re Birmingham Nashville Express, Inc.*, 221 B.R. 194 (M.D. Tenn. 1998); *In re Allentown Moving & Storage, Inc.*, 214 B.R. 761 (Bankr. E.D. Pa. 1997).

3. *The Tenth Circuit View*

In this case, the Tenth Circuit noted the conflict in circuits, but agreed with the conclusion and much of the reasoning of the *HLM* court, finding that because workers' compensation insurance is statutorily mandated, it is not a bargained-for wage substitute or "fringe benefit," and that it is therefore not entitled to priority status. *Id.* at 716. It found that workers' compensation insurance it is not an employee benefit plan because it "benefits the employer at least as much, if not more, than the employee" and is not primarily for the benefit of the employee. *Id.* Although these limitations are clearly not contained in the plain language of the statute, the court gleaned these limitations from the legislative history of section 507(a)(4). *Id.*

The Bankruptcy Appellate Panel for the Tenth Circuit also agreed with much of the *HLM* court's reasoning, but took it even one step further, finding that the priority was meant to apply only to claims of employees, and not to third parties' claims. *See* 210 B.R. 838, 842 (10th Cir. B.A.P. 1997). Unlike the Tenth Circuit, the BAP did not find that the statute was ambiguous, and simply looked to the plain language of the statute. Although the plain language of section 507 includes no requirement that a contribution be "voluntary," the BAP

nevertheless found that insurance premiums are not "contributions," finding that a contribution must be voluntary, and reasoning that statutorily mandated workers' compensation insurance is not voluntary. *Id.* at 841. The BAP also found that workers' compensation insurance is not a "plan" because it is not a way in which an employer seeks to compensate an employee in ways other than wages, but rather a statutorily mandated system to spread risks of work related injuries. *Id.* at 841. It further found that insurance premiums do not arise from "services rendered" by employees as required under section 507(a)(4), but rather from the debtor's failure to pay its insurer. *Id.* Finally, the BAP found without discussion that workers' compensation insurance is not a "benefit" plan because it provides workers an alternative to recovering for work related injuries through the courts. *Id.*

Both the Tenth Circuit and the BAP found that although the Employment Retirement Security Act ("ERISA") defined the term "employee benefit plan," the ERISA definition would not be helpful. The courts completely ignored the legislative history, discussed in detail below, that indicates the ERISA definition is relevant to the interpretation of section 507(a)(4). 144 F.3d at 714; 210 B.R. at 842.

II.

BECAUSE OF THE CONFUSION IN THE LAW, THIS CASE PRESENTS THIS COURT WITH IMPORTANT ISSUES OF FEDERAL LAW; DUE TO THE GRAVITY OF THESE ISSUES AND THE FREQUENCY WITH WHICH THEY OCCUR, THEY SHOULD BE SETTLED BY THIS COURT.

The conflict in the courts of appeal, as well as the lack of controlling precedent, has created an irreconcilable division in the bankruptcy courts and federal district courts presented with

the application of this section of the Code. Not surprisingly, many of these courts have held that claims for workers' compensation insurance premiums are entitled to priority status under 507(a)(4), and many have held that they are not. *Compare In re Braniff, Inc.*, 218 B.R. 628 (Bankr. M.D. Fla. 1998); *In re Gerald T. Fenton, Inc.*, 178 B.R. 582 (Bankr. D.D.C. 1995); *Perlstein v. Rockwood Ins. Co. (In re AOV Indus., Inc.)*, 85 B.R. 183 (Bankr. D.D.C. 1988) (holding that claims for workers' compensation insurance premiums *are* entitled to priority) *with In re Allentown Moving & Storage, Inc.*, 208 B.R. 835 (Bankr. E.D. Pa. 1997); *In re the Montaldo Corp.*, 207 B.R. 112 (Bankr. M.D.N.C. 1997); *In the Matter of Arrow Carrier Corp.*, 154 B.R. 642 (Bankr. D. N.J. 1993) (holding that they are not).

This has created 4 critical questions which must be addressed before this issue can be completely resolved, and before there will be consistency in the treatment of insurers and other third-parties who help employers fund benefit plans:

A. Should the ERISA definition of "employee benefit plan" be used to interpret section 507(a)(4)?

B. Are the claims of non-employee third-parties eligible for section 507(a)(4) priority?

C. Must benefits be directly bargained-for to qualify for priority status? and

D. If third-party insurers' claims are covered, is workers' compensation insurance critically different than other types of insurance?

A. Should the ERISA definition of "employee benefit plan" be used to interpret section 507(a)(4)?

The term "employee benefit plan" is specifically defined in ERISA as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

See 29 U.S.C. §§ 1002(1), 1002(3) (1996). Under the plain language of this definition, a plan for purchasing workers' compensation insurance to provide medical or hospital care or other benefits resulting from disability incurred by virtue of a workplace injury qualifies as an "employee benefit plan." For the same reasons, a claim for the premiums which are paid, or contributed by the employer in order to fund and maintain such a plan should be entitled to priority under section 507(a)(4) of the Code.

Although the Code does not specifically refer to or incorporate the ERISA definition, many courts have found that definition useful in interpreting section 507(a)(4). In fact,

because Congress adopted ERISA prior to adopting section 507(a)(4), and because ERISA and section 507(a)(4) have similar purposes, using the ERISA definition would simplify the conflict this case presents. Where Congress "borrows" terms of art which have an accepted meaning, it presumably adopts that meaning unless it indicates otherwise. *In re Allegheny Int'l*, 138 B.R. at 173 n.5 (citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)); *In re Plaid Pantries*, 137 B.R. at 407; *In re Saco*, 23 B.R. at 646; *see also United States v. Embassy Restaurants, Inc.*, 359 U.S. 29, 38 (1959) ("[o]f course, a word need not mean the same thing in different statutes, but the meaning attributed in one Act is far from irrelevant to the interpretation of another.") (Black, J., dissenting). Nothing in the language of section 507(a)(4) or its legislative history indicates the term was meant to have a distinctly different meaning in the Code.

Based on this and similar reasoning, the following courts have held that the ERISA definition of "employee benefit plan" is helpful in interpreting and applying section 507: *In re Plaid Pantries, Inc.*, 137 B.R. 405, 406 (D. Or. 1991), *aff'd on other grounds*, 10 F.3d 605 (9th Cir. 1993); *In re Allegheny Int'l, Inc.*, 138 B.R. 171, 173 (Bankr. W.D. Pa. 1992), *aff'd*, 145 B.R. 820 (W.D. Pa. 1992); *Perlstein v. Rockwood Ins. Co. (In re AOV Indus., Inc.)*, 85 B.R. 183, 186 (Bankr. D. Colo. 1988); *In re Saco Local Dev. Corp.*, 23 B.R. 644, 646 (Bankr. D. Me. 1982), *aff'd on other grounds*, 711 F.2d 441 (1st Cir. 1983).

Other courts have disagreed, finding that the ERISA definition has no relevance to the term as it might have been used in the Bankruptcy Code. or that use of that definition results in an overly broad interpretation of section 507(a)(4). *See, e.g., HLM*, 62 F.3d at 226; *Southern Star*, 144 F.3d at 714; 210 B.R. at 842; *In re the Montaldo Corp*, 207 B.R. 112, 115 (Bankr. M.D. N.C. 1997); *In re Jet Florida Systems, Inc.*, 80 B.R. 544, 547 (S.D. Fla. 1987).

In fact, legislative history supports the conclusion that Congress intended the term "employee benefit plan" to have the same meaning in section 507 that it has under ERISA. When a House Subcommittee was considering part of what became the 1979 Bankruptcy Code, the Subcommittee was specifically urged to adopt the term "employee benefit plan" as used in ERISA into the section on priorities in order to provide broad protection to all employee benefit plans. *See* Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st & 2d Sess. 2424-2425 (1975-76). The Subcommittee was urged to make the statute broad, and to delete restrictive wording which mentioned specific types of plans, on the grounds that such restrictive language would cause courts to limit the types of claims covered by the priority to only those listed. *Id.* The fact that Congress did then adopt that very term found in ERISA supports the use of the ERISA definition in interpreting section 507(a)(4). *See In re Allegheny*, 138 B.R. at 174; *In re Saco*, 23 B.R. at 646.

B. Are the claims of non-employee third-parties eligible for section 507(a)(4) priority?

A majority of courts have held that the priority of section 507(a)(4) is available to third-parties, and is not limited to claims of employees. *See, e.g., Plaid Pantries, Inc.*, 10 F.3d 605; *In re Saco*, 711 F.2d 441; *In re Lummus Indus., Inc.*, 193 B.R. 615 (Bankr. M.D. Ga. 1996); *In re Gerald T. Fenton, Inc.*, 178 B.R. 582 (Bankr. D. Colo. 1995); *In re Cardinal Indus., Inc.*, 164 B.R. 76 (Bankr. S.D. Ohio 1993); *Allegheny Int'l, Inc. v. Metropolitan Life Ins. Co.* (*In re Allegheny Int'l, Inc.*), 138 B.R. 171 (Bankr. W.D. Pa. 1992), *aff'd*, 145 B.R. 120 (W.D. Pa. 1992); *Perlstein v. Rockwood Ins. Co.* (*In re AOV Indus., Inc.*), 85 B.R. 193 (Bankr. D. Colo. 1988); *In re Jet Florida Sys., Inc.*, 80 B.R. 544 (S.D. Fla. 1987); *In re Robinson*

Truck Line, Inc., 47 B.R. 631 (Bankr. N.D. Miss. 1985); and *see In re Cirrus Corp.*, 196 B.R. 76 (S.D. Tex. 1996) (granting priority to claim of insurer but not specifying statutory authority). Even the Eighth Circuit decision in *HLM Corp.*, 62 F.3d 224 (8th Cir. 1995), does not disagree with this point.

The decisions in these cases are based, for the most part, on the realization that the best way to provide employees with the benefit of health, life or workers' compensation insurance is to ensure that the premiums entitling them to those benefits continue to be paid, along with other costs and expenses borne by the third-party in providing the benefits.

Some courts, however, have found that the intent of section 507(a)(4) is to provide protection only to claims of employees, regardless of how much employees would be benefitted by allowing third-parties' claims priority status. *See, e.g., In re Montaldo*, 207 B.R. at 117; *In re AER-Aerotron, Inc.*, 182 B.R. 725, 727 (Bankr. E.D. N.C. 1995).

C. Must benefits be directly bargained-for to qualify for priority status?

By reading a "bargained-for" restriction into the statute based on their reading of legislative history, the courts are using legislative history to reach a result not mandated by the plain language of the statute. Also, although the insurance may indirectly benefit the employer by assisting the employer in remaining in compliance with state law, it is clear that the main purpose of the statutory mandate is to protect employees, not employers. In practice, any benefit provided to an employee indirectly benefits the employer, either by attracting a better class of employees or by ensuring compliance with a collective bargaining agreement.

By finding that a contribution to an employee benefit plan must be a bargained-for wage substitute in order to qualify for priority status, courts have ignored the plain language of the statute and improperly added an additional limitation to the statutory priority. *See In re Edgar B., Inc.*, 200 B.R. 119, 122 (M.D. N.C. 1996) (bankruptcy court cannot impose additional limitations on statutory priority established for employee benefit plans). Because the plain language of section 507(a)(4) applies to all types of contributions to employee benefit plans, and because the statute contains no language restricting the priority either to wage substitutes or negotiated benefits, this Court should correct the decisions finding that such limitations are somehow implied.

D. If third-party insurers' claims are covered, is workers' compensation insurance critically different than other types of insurance?

Most of the courts finding that claims for workers' compensation insurance premiums are not entitled to priority status — including the Tenth Circuit in this case — have followed the Eighth Circuit's *HLM* decision and held that workers' compensation insurance is fundamentally different than other insurance because it is statutorily rather than contractually mandated. *See, e.g., Southern Star*, 144 F.3d at 716; *In re Allentown Moving & Storage, Inc.*, 208 B.R. 835 (Bankr. E.D. Pa. 1997); *In re the Montaldo Corp.*, 207 B.R. 112 (Bankr. M.D. N.C. 1997); *In the Matter of Arrow Carrier Corp.*, 154 B.R. 642 (Bankr. D. N.J. 1993). These courts generally read the legislative history of section 507(a)(4) to require that "employee benefits" be direct, bargained-for wage substitutes and reason that statutorily mandated insurance coverage is not bargained-for. They also find that because the insurance may benefit the employer by allowing it to comply with applicable laws, it is not a "benefit" to the employee. *See, e.g., Southern Star*, 144 F.3d at 716.

Other courts do not read the plain language of section 507(a)(4) to require that employee benefits be directly bargained-for and find that regardless of all of the reasons an employer might procure workers' compensation insurance, it nevertheless benefits the employee along with the employer. *See Plaid Pantries*, 10 F.3d at 607. These courts also point out that if an employer is required to purchase insurance for its employees, it is highly likely that the cost of that insurance will be passed on to those employees in the form of lower wages. In that sense, it is a wage substitute. *See Id.*

In almost every state, employers are required by law to provide employees with workers' compensation benefits. Despite this universal recognition of the importance of these benefits, courts are reading limiting terms into section 507 to make workers' compensation benefits an exception to the general rule that employee benefits will be given priority. This approach defies logic.

If the statute is read to contain a requirement that covered benefits be "bargained-for," courts attempting to apply that concept will certainly need guidance in this area. The concept raises many questions for which there is no existing precedent. As an example, courts will have to determine whether "bargained-for" fringe benefits are only those covered by a collective bargaining agreement. If not, how will a court determine whether a particular benefit was actually "bargained-for"? Should courts take testimony from the employer regarding whether employees would be paid more wages if they did not receive insurance benefits, or should it evaluate the situation of individual employees?

It is also apparent that health benefits may become mandatory in many jurisdictions. If those benefits are mandatory, would there then be any difference between health insurance and workers' compensation insurance for purposes of section 507(a)(4)?

It is clear that there are many areas of conflict for which there is no clear precedent. It is also evident that without clarification from this Court, the issue will remain unresolved, with resulting confusion for judges, trustees, employers and employees across the country.

CONCLUSION

Congress enacted the federal statute in question to overrule two prior decisions of this Court, which held that fringe benefits were not "wages," as that term is used in section 507(a)(3) of the Bankruptcy Code. Congress has indicated that it enacted the legislation so that all employer-provided benefits enjoyed by employees would be included within the terms of the section 507 priorities, regardless of whether they were in the form of wages. The courts which have interpreted and applied this statute have reached an irreconcilable conflict, and there is accordingly no uniformity in how the statute is applied, or how similarly positioned creditors and employees are treated. This Court has not previously addressed this issue, but should, in order to provide uniformity in the application of federal law. This conflict will not be resolved without action by this Court, and the issue will continue to arise and have far-reaching consequences until the conflict is resolved.

Wherefore, Petitioner the State Insurance Fund respectfully requests that its Petition for Certiorari be granted and that the opinion of the Tenth Circuit Court of Appeals in this case be reviewed by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED MAY 21, 1998

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 97-7102
BAP No. EO-96-034
E.D. Oklahoma
(D.C. No. 94-71621)

In re: SOUTHERN STAR FOODS, INC.,

Debtor,

STATE INSURANCE FUND,

Appellant,

v.

SOUTHERN STAR FOODS, INC.; KENNETH G.M. MATHER, Trustee,

Appellees.

JUDGMENT

Filed May 21, 1998

Before **BRORBY, BARRETT,** and **BRISCOE,** Circuit Judges.

This case originated from the United States Bankruptcy Appellate Panel for the Tenth Judicial Circuit and was submitted on the briefs on the direction of the court.

Appendix A

The judgment of that court is affirmed.

Entered for the Court
PATRICK FISHER, Clerk

by: s/ [illegible]
Deputy Clerk

Appendix A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 97-7102

In re:

SOUTHERN STAR FOODS, INC.,

Debtor,

STATE INSURANCE FUND,

Appellant,

v.

SOUTHERN STAR FOODS, INC.; KENNETH G.M. MATHER, Trustee,

Appellee.

APPEAL FROM THE UNITED STATES
BANKRUPTCY APPELLATE PANEL
BAP No. EO-96-034
E.D. Oklahoma
(D.C. No. 94-71621)

* * *

Appendix A

Before **BRORBY**, **BARRETT**, and **BRISCOE**, Circuit Judges.

BRISCOE, Circuit Judge.

Appellant, the State Insurance Fund (Fund), appeals from the Bankruptcy Appellate Panel (BAP) decision that its claim for unpaid workers' compensation insurance premiums is not entitled to priority status under 11 U.S.C. § 507(a)(4) in the Chapter 7 bankruptcy of the debtor, Southern Star Foods.[1] *See State Ins. Fund v. Mather (In re Southern Star Foods, Inc.)*, 210 B.R. 838 (10th Cir. B.A.P. 1997). This appeal presents a purely legal question, which we review de novo. *See Broitman v. Kirkland (In re Kirkland)*, 86 F.3d 172, 174 (10th Cir. 1996). We affirm.

Southern Star contracted with the Fund to provide workers' compensation insurance coverage. On November 17, 1994, the insurance was canceled. At the time the coverage was canceled, Southern Star owed the Fund hundreds of thousands of dollars in unpaid premiums. When an involuntary petition in bankruptcy was filed against Southern Star on December 23, 1994, the Fund claimed priority status for their unsecured creditors' claim under § 507(a)(4), in the amount of $186,898.27.[2] The trustee objected to the Fund's claim of priority status, and the Bankruptcy Court sustained the objection, finding that § 507(a)(4) did not give priority status to a claim for unpaid workers' compensation premiums. The

1. After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

2. The parties have stipulated that this is the amount of premiums incurred within 180 days of the petition date. *See* 11 U.S.C. § 507(a)(4) (providing for priority of certain claims arising from services rendered within 180 days before the filing of the petition).

Fund appealed the decision to the BAP, which affirmed the denial of priority status under § 507(a)(4) in a very thorough and well-reasoned opinion.

The relevant portion of § 507(a)(4) provides:

> (a) The following expenses and claims have priority in the following order;
>
> (4) Fourth, allowed unsecured claims for contributions to an employee benefit plan —
>
> (A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only
>
> (B) for each such plan, to the extent of —
>
> (I) the number of employees covered by each such plan multiplied by $4,000; less
>
> (ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.[3]

The position of the parties in this appeal is simple and straightforward. The Fund argues that the unpaid workers' compensation insurance premiums owed to it by Southern Star are contributions to an employee benefit plan within the meaning of

---

3. Paragraph (3) provides priority for unpaid wages.

§ 507(a)(4), and are, therefore, entitled to priority status. The trustee argues that they are not.

We begin our analysis with the premise that the overriding objective in bankruptcy cases is equal distribution of the debtor's limited resources among its creditors. *See Isaac v. Temex Energy, Inc. (In re Amarex, Inc.)*, 853 F.2d 1526, 1530 (10th Cir. 1988). To that end, statutory priorities must be narrowly construed. *See id.*

The Bankruptcy Code does not define "contributions to an employee benefit plan." The Fund urges us to look to the Employee Retirement Income Security Act of 1974 (ERISA) and apply the definition of "employee benefit plan" set forth in that statute to § 507(a)(4). We decline to read the ERISA definition of "employee benefit plan" into the Bankruptcy Code. We agree with the Eighth Circuit that " '[t]he ERISA definition and associated court guidelines were designed to effectuate the purpose of ERISA, not the Bankruptcy Code.' " *Employers Ins. of Wausau, Inc. v. Ramette (In re HLM Corp.)*, 62 F.3d 224, 226 (8th Cir. 1995) (quoting *Employers Ins. of Wausau, Inc. v. Ramette (In re HLM Corp.)*, 183 B.R. 852, 855 (D. Minn. 1994)); *accord In re The Montaldo Corp.*, 207 B.R. 112, 115 (Bankr. M.D.N.C. 1997); *Official Labor Creditors Comm. v. Jet Florida Sys., Inc. (In re Jet Florida Sys., Inc.)*, 80 B.R. 544, 547 (S.D. Fla. 1987); *see also United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 116 S.Ct. 2106, 2111-13 (1996) (declining to apply usage of term in Internal Revenue Code to term in Bankruptcy Code, absent some Congressional indication). Further, broadening the Bankruptcy Code by incorporating the ERISA definition into the § 507(a)(4) priority determination would be contrary to the tenet that priorities are to be narrowly construed. *See In re Amarex, Inc.*, 853 F.2d at 1530.

Two other circuit courts have addressed the issue of whether workers' compensation premiums are contributions to an employee benefit plan within the meaning of § 507(a)(4) so as to be entitled to priority status, and they reached opposite conclusions. *Compare Employers Ins. of Wausau, Inc. v. Ramette (In re HLM Corp.)*, 62 F.3d 224, 227 (8th Cir. 1995) (holding that unpaid workers' compensation premiums were not contributions to an employee benefit plan entitled to priority status), *aff'g* 183 B.R. 852 (D. Minn. 1994), *aff'g* 165 B.R. 38 (Bankr. D. Minn. 1994), *with Employers Ins. of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605, 607 (9th Cir. 1993) (holding that unpaid workers' compensation premiums were entitled to priority status under § 507(a)(4)). Other courts finding that claims for workers' compensation premiums were not entitled to priority under § 507(a)(4) include *In re Southern Star Foods, Inc.*, 210 B.R. at 844, *aff'g* 201 B.R. 291 (Bankr. E.D. Okla. 1996); and *In re Allentown Moving & Storage, Inc.*, 208 B.R. 835, 837 (Bankr. E.D. Pa. 1997), *aff'd* 214 B.R. 761 (E.D. Pa. 1997). Other cases finding that claims for workers' compensation premiums were entitled to priority include *In re Braniff, Inc.*, 218 B.R. 628, 635 (Bankr. M.D. Fla. 1998) (deciding issue without examining legislative history, and adopting the position in *In re Gerald T. Fenton, Inc.* with no discussion of ERISA); *In re Gerald T. Fenton, Inc.*, 178 B.R. 582, 587-88, 590 (Bankr. D. D.C. 1995) (applying ERISA definition of "employee benefit plan"); and *Perlstein v. Rockwood Ins. Co. (In re AOV Indus., Inc.)*, 85 B.R. 183, 186, 189 (Bankr. D. D.C. 1988) (same).[4]

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4. Also helpful to our analysis, although not directly on point, are the decisions that have reached the question of priority with regard to premiums for types of insurance other than workers' compensation. *Compare In re The Montaldo Corp.*, 207 B.R. 112, 115-16 (Bankr. M.D.N.C. 1997) (holding no priority for health insurance premiums for past coverage

(Cont'd)

Before we can answer this question of first impression in this Circuit, we must first determine whether the meaning of the statute is evident from its plain language, or if the phrase is ambiguous. The split in the circuits is, in itself, evidence of the ambiguity of the phrase "contributions to an employee benefit plan;" its meaning is not evident based on the plain language of the statute. Because the phrase is ambiguous, we turn to the legislative history of the statute to aid our analysis. *See United States v. Simmonds*, 111 F.3d 737, 742 (10th Cir. 1997).

Like the BAP, we agree with the Eighth Circuit that the legislative history clarifies that § 507(a)(4) grants priority for "fringe benefits" accepted in lieu of wages. *In re HLM, Corp.*, 62 F.3d at 225-26.[5] In enacting § 507(a)(4), Congress stated:

(Cont'd)
because payment for past coverage benefits only third-party insurer, not employees); *In re AER-Aerotron, Inc.*, 182 B.R. 725, 726-27 (Bankr. E.D.N.C. 1995) (finding no priority for group health/life insurance premiums because legislative history and plain meaning of statute indicate priority is meant for employees, not third parties),*with Official Creditors' Comm. of Lummus Indus., Inc. v. Blue Cross & Blue Shield of Georgia, Inc. (In re Lummus Indus., Inc.)*, 193 B.R. 615, 617-18 (Bankr. M.D. Ga. 1996) (finding unreimbursed health insurance claims under self-funded insurance plan entitled to priority where self-insurance plan was part of the compensation for debtor's employees); *Official Labor Creditors Comm. v. Jet Florida Sys., Inc. (In re Jet Florida Sys., Inc.)*, 80 B.R. 544, 547-48 (S.D. Fla. 1987) (finding employee claims for unreimbursed insurance claims under self-insurance plan entitled to priority).

5. The fact that the holding of *In re HLM Corp.* is based on Minnesota's workers' compensation scheme does not negate its persuasive authority. Only a small portion of the court's reasoning is based on the unique aspects of that state's statutory scheme; the bulk of the analysis is based on general workers' compensation characteristics. The factual distinctions between Oklahoma's and Minnesota's statutory schemes do not vitiate the applicability of *In re HLM Corp.* to this case.

Appendix A

> The Supreme Court has held that the wage priority does not extend to fringe benefits, such as pension fund or health insurance contributions. When the wage priority was last amended in 1926, perhaps the intent of Congress was not to extend it in that fashion, because fringe benefits were little heard of at the time. Now, however, to ignore the reality of collective bargaining that often trades wage dollars for fringe benefits does a severe disservice to those working for a failing enterprise.
>
> In recognition of changes since 1926, the bill . . . establishes a new category, a fourth priority immediately following the wage priority, for contributions and payments to employee benefit plans. This will include health insurance programs, life insurance plans, pension funds, and all other forms of employee compensation that is not in the form of wages.

H.R. Rep. No. 95-595, at 187 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6148 (footnotes omitted). Specifically addressing § 507(a)(4), the legislative history provides:

> Paragraph (4) overrules *United States v. Embassy Restaurant*, 359 U.S. 29 (195[9]), which held that fringe benefits were not entitled to wage priority status. The bill recognizes the realities of labor contract negotiations, under which wage demands are often reduced if adequate fringe benefits are substituted. The priority granted is limited to claims for contributions to employee benefit plans such as pension plans, health or life insurance plans, and others, arising from services rendered after the earlier of one year before the

> bankruptcy case and the date of cessation of the debtor's business.

Id. at 357, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 (footnotes omitted); *see also* S. Rep. No. 95-989, at 69 (1978) *reprinted in* 1978 U.S.C.C.A.N. 5787, 5855.

The legislative history makes it clear that Congress enacted § 507(a)(4) to benefit employees. It recognized the reality that employees often bargain for fringe benefits in lieu of higher wages. The two Supreme Court cases that gave rise to the enactment of § 507(a)(4) both involved plans organized to provide benefits for employees pursuant to collective bargaining agreements. *See Embassy Restaurant*, 359 U.S. at 29-30 (contributions owed by employer to welfare fund); *Joint Indus. Bd. of Elec. Indus. v. United States*, 391 U.S. 224, 225 (1968) (contributions owed by employer to employees' annuity plan). In those cases, the Court denied priority status under the statutory priority for wages in effect at the time, for contributions to plans that provided fringe benefits for employees. Section 507(a)(4) was enacted to change that result.

Workers' compensation coverage, on the other hand, is not a fringe benefit that an employee can bargain for, either explicitly or impliedly, in lieu of higher wages. It is not a fringe benefit or wage substitute, as contemplated by Congress in enacting § 507(a)(4). In addition, the legislative history indicates that workers' compensation is not an employee benefit plan because the coverage benefits the employer at least as much, if not more, than the employee. As both the Bankruptcy Court and the BAP recognized, "since workers' compensation premiums are required to meet an obligation imposed by the state, they were primarily for Southern Star's benefit, not its employees." *In re Southern Star Foods*, 210 B.R. at 843. To that end,

> [t]he purpose of the Oklahoma workers' compensation benefit scheme simply cannot be interpreted as a "fringe benefit" supplementing wages. In fact, the scheme was a compromise between workers and employers in which the workers gave up the right to sue for damages for work-related injuries, and the employers gave up certain defenses, such as the "fellow servant rule." *Carroll [v. District Court]*, 579 P.2d [828,] 830 [(Okla. 1978)]. The Oklahoma Supreme Court observed, "[e]very common-law right of the workman has been abrogated, and another right substituted, not governed by common-law rules. . . . The injured workman can no longer use common-law rules . . . to extract compensation for injuries sustained by him." *Brooks v. A.A. Davis & Co.*, 254 P. 66, 70 (1926).

Id. at 844.

In reaching our holding today, we are mindful of the Ninth Circuit decision in *Plaid Pantries*, with which we respectfully disagree. That court examined the legislative history, but interpreted it differently in holding that premiums owed for workers' compensation coverage were entitled to priority under § 507(a)(4). *See Plaid Pantries*, 10 F.3d at 607. In deciding that the benefit need not be a wage substitute, that court construed the statutory priority broadly, something we must guard against. The court in *Plaid Pantries* cites *In re Saco Local Dev. Corp.*, 711 F.2d 441 (1st Cir. 1983) in support of its holding. We note that *In re Saco* is not inconsistent with our holding in this case. That court considered the question of whether § 507(a)(4) was intended to afford priority only for contributions made to benefit plans that resulted from a formal collective bargaining process.

See id. at 448-49. In holding that the legislative history did not limit the fringe benefit priority to those benefits resulting from formal collective bargaining, the court noted that the record contained evidence that the group life/health/disability plan resulted in a de facto bargain for which employees accepted lower wages than other firms paid. *See id. In re Saco* does not conflict with our holding in this case.[6]

We hold that premiums for workers' compensation insurance are not contributions to an employee benefit plan as contemplated by Congress in the enactment of § 507(a)(4). Therefore, a claim for unpaid workers' compensation premiums is not entitled to priority status under that statute. AFFIRMED.

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6. Because it is not necessary to our decision in this case, we do not reach the question of whether Congress intended that third parties, such as insurance companies, may claim the priority afforded in § 507(a)(4). *Compare In re Saco*, 711 F.2d at 449 (holding that "[t]o allow the insurer to obtain its premiums through the priority would seem the surest way to provide the employees with the policy benefits to which they are entitled."), *with In re Montaldo*, 207 B.R. at 117 (finding that to allow insurance company priority would be contrary to § 507(d)); In *re AER-Aerotron*, 182 B.R. at 727 (finding that § 507(a)(4) does not provide priority to third parties).

APPENDIX B — OPINION OF THE UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT FILED JULY 28, 1997

PUBLISH

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT

BAP No. EO-96-034

Bankr. No. 94-71621
Chapter 7

IN RE SOUTHERN STAR FOODS, INC.,

Debtor.

THE STATE INSURANCE FUND,

Appellant,

v.

KENNETH G.M. MATHER, Trustee; and SOUTHERN STAR FOODS, INC.,

Appellees.

Appeal from the United States Bankruptcy Court
for the Eastern District of Oklahoma

* * *

Appendix B

OPINION

Before McFEELEY, Chief Judge, PEARSON, and BOULDEN, Bankruptcy Judges.

McFEELEY, Chief Judge.

The State Insurance Fund (the "Fund") appeals from a final order of the United States Bankruptcy Court for the Eastern District of Oklahoma denying the Fund priority status under 11 U.S.C. § 507(a)(4).[1] *In re Southern Star Foods, Inc.*, 201 B.R. 291 (Bankr. E.D. Okla. 1996). This Court has jurisdiction under 28 U.S.C. § 158(c), and reviews the statutory interpretation of the Bankruptcy Court de novo. Tulsa *Energy, Inc. v. KPL Prod. Co. (In re Tulsa Energy,* Inc.), 111 F.3d 88, 89 (10th Cir. 1997). Because this Court agrees with the Bankruptcy Court that unpaid workers' compensation premiums are not entitled to priority status pursuant to § 507(a)(4), we affirm.

BACKGROUND

In the Bankruptcy Court the parties stipulated to the following facts: Southern Star Foods, Inc. ("Southern Star") contracted with the Fund for workers' compensation insurance coverage from February 1, 1994, to November 17, 1994, when the Fund canceled coverage for nonpayment of premiums. Southern Star did not pay the premiums due to the Fund from May 1, 1994, to November 17, 1994, in the amount of $230,849. 00.

On December 23, 1994, several creditors filed an involuntary Chapter 7 petition against Southern Star. On January 11, 1995,

1. Future references are to title 11 of the United States Code unless otherwise noted.

the Court entered an order for relief and on January 23, 1995, appointed Kenneth G.M. Mather as trustee (the "Trustee") of Southern Star's bankruptcy estate.

On March 17, 1995, the Fund filed its proof of claim asserting priority status under §§ 507(a)(3) and (a)(4).[2] In response to the

2. Sections 507(a)(3) and (a)(4) read as follows:

> (a) The following expenses and claims have priority in the following order:
>
> . . .
>
> (3) Third, allowed unsecured claims, but only to the extent of $4,000 for each individual or corporation, as the case may be, earned within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for —
>
> > (A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; . . .
>
> (4) Fourth, allowed unsecured claims for contributions to an employee benefit plan —
>
> > (A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only
> >
> > (B) for each such plan, to the extent of —
> >
> > > (i) the number of employees covered by each such plan multiplied by $4,000; less
> >
> > > (ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

Trustee's objection, the Fund conceded the inapplicability of § 507(a)(3) but pursued its claim for priority under § 507(a)(4). Southern Star did not cease operations before the involuntary bankruptcy filing. Under § 507(a)(4) any priority claim of the Fund had to be incurred within 180 days before the involuntary petition was filed. The Fund amended its priority claim to $186,898.27, consisting of unpaid premiums incurred during this period. The Fund conceded that the remaining amount of their claim, $43,950.73 incurred before the 180-day period, should be allowed only as a general unsecured claim.

DISCUSSION

Section 507(a)(4) gives fourth priority status to "allowed unsecured claims for contributions to an employee benefit plan . . . arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first."

The Fund argues that unpaid workers' compensation insurance premiums should be granted priority status under the plain meaning of the statutory phrase, "contributions to an employee benefit plan" as held by *Employers Ins. v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir. 1993). The Trustee argues that these unpaid premiums should not be granted priority status relying on the statute's legislative history and citing *Employers Ins. v. Ramette (In re HLM Corp.)*, 62 F.3d 224 (8th Cir. 1995).

Priority status is not favored because the overriding policy in bankruptcy is equal treatment of creditors. *Jarboe v. SBA (In re Hancock)*, 137 B.R. 835, 837-38 (Bankr. N.D. Okla. 1992), *cited in Southern Star*, 201 B.R. at 293; *see also SBA v. Preferred Door Co., Inc. (In re Preferred Door Co., Inc.)*, 990 F.2d 547,

550-51 (10th Cir. 1993) (Bankruptcy Court's equitable power does not extend to altering Bankruptcy Code's "comprehensive scheme of priorities."). Therefore, statutory priorities should be construed narrowly. *Isaac vs. Temex Energy, Inc. (In re Amarex, Inc.)*, 853 F.2d 1526, 1530 (10th Cir. 1988). We agree with the Bankruptcy Court that in cases such as this one in which the debtor's assets are inadequate to satisfy all creditor's claims, priority status should be awarded only where "it is so strongly deserved as to override the claims of all other creditors to equal treatment." *Southern Star*, 201 B.R. at 293; *see Employers Ins. v. Ramette (In re HLM Corp.)*, 183 B.R. 852, 856 (D. Minn. 1994), *aff'd*, 62 F.3d 224 (8th Cir. 1995); *cf. United States v. Dumler (In re Cassidy)*, 983 F.2d 161, 164 (10th Cir. 1992) (discussing priorities under § 507(a)(7) and recognizing need to balance granting of priorities with "punishing innocent creditors of a bankrupt"). We are especially mindful of this policy in examining this issue of first impression in the Tenth Circuit.

We begin with the statutory language itself. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). However, the Bankruptcy Code does not define "contributions to an employee benefit plan." In analyzing the language of the statute, we look to the plain meaning of each term.

First, § 507(a)(4) covers "contributions" to an employee benefit plan. Here the Fund contracted with Southern Star to provide it insurance upon the payment of premiums. This insurance contract was not a "contribution" to an employee benefit plan. *In re AER-Aerotron, Inc.*, 182 B.R. 725, 727 (Bankr. E.D.N.C. 1995). Similarly, premiums arising from the issuance of a policy of insurance are not generally referred to as "contributions." *In re The Montaldo Corp.*, 207 B.R. 112, 114 (Bankr. M.D.N.C. 1997). A "contribution" implies some sort of

voluntary act. Typically, fringe benefits such as health, life and disability insurance are voluntarily given to employees. The payment of workers' compensation insurance premiums is not "voluntary;" it is mandated by statute. *In re HLM Corp.*, 165 B.R. 38, 40 (Bankr. D. Minn. 1994), *aff'd*, 183 B.R. 852, 856 (D. Minn. 1994), *aff'd*, 62 F.3d 224 (8th Cir. 1995). *See also In re Allentown Moving & Storage, Inc.*, 208 B.R. 835, 837 (Bankr. E.D. Pa. 1997) ("[S]ince workers' compensation benefits are a statutory requirement and not obtained through collective bargaining, they cannot be considered a 'contribution' to an employee's 'benefit plan.' Workers' compensation renders a benefit to both employer and employee.").

Second, in the context of § 507(a)(4), a "plan" is the manner in which an employer seeks to compensate an employee in ways other than wages. Workers' compensation insurance is not a "plan," but is a statutorily mandated system to spread risks of work-related injuries. *Id.;* Okla. Stat. Ann. tit. 85, §§ 1 et seq. (West 1997).

Third, insurance premiums do not arise from "services rendered" by employees as required under § 507(a)(4). The rendering of services by employees results in obligations to them, not to the insurer. *Montaldo*, 207 B.R. at 114. The claim for unpaid premiums does not arise from "services rendered" but from Southern Star's failure to pay its insurer. This makes it indistinguishable from a typical unsecured claim. *AER Aerotron, Inc.*, 182 B.R. at 727; *HLM*, 165 B.R. at 41.

As for whether workers' compensation insurance is a "benefit" plan, it is not. Instead, it provides workers an alternative to recovery for work related injuries through the courts. *Carroll v. District Court*, 579 P.2d 828, 830 (Okla. 1978). Allowing priority

status for workers' compensation insurance premiums would shift the recipient of priority status from the debtor's employees to the insurance carrier, which is not what Congress intended in § 507(a)(4).

> The § 507(a)(4) priority would apply to contributions to an employee benefit plan that are made by both employees and by employers. The statute does not, however, provide a priority to third parties. Furthermore, even if a third party were to be subrogated to an employee's claim under § 507(a)(4), that claim would be denied priority pursuant to § 507(d).

AER-Aerotron, 182 B.R. at 727. The reference in § 507(a)(4) to "services rendered" makes clear that Congress intended a debtor's employees, not third party workers' compensation funds or insurance carriers, to be the recipients of fourth priority status. *Montaldo*, 207 B.R. at 114 ("The rendering of services by employees results in obligations to the employees and not to an insurer."). Southern Star's employees do not have a claim against Southern Star for the unpaid premiums. Allowing the Fund to have priority under § 507(a)(4), a priority intended to benefit employees, is tantamount to subrogating the Fund to the priority of the employees, which is impermissible under § 507(d).[3] *Montaldo*, 207 B.R. at 117.

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3. Section 507(d) states:

> An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection . . . (a)(4) . . . of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

Significantly, the statutory cap on the priority described in § 507(a)(4)(B) refers to the wage priority in (a)(3) as a part of the cap's calculation. If insurance premium amounts were intended to be similarly capped, it would not be tied to the amount that employees may collect under the wage priority. *AER-Aerotron,* 182 B.R. at 727.

The Fund urges this Court to apply to the Bankruptcy Code the definition of employee benefit plan from the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq.[4] Some of the cases granting priority status to

4. ERISA defines "employee benefit plan" as follows:

> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs. or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).
>
> (2) The terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program —

(Cont'd)

insurance premiums have done so by incorporating the ERISA definition. *Metropolitan Life Ins. Co. v. Allegheny Int'l, Inc. (In re Allegheny Intl, Inc.)*, 138 B.R. 171 (Bankr. W.D. Pa. 1992), *aff'd*, 145 B.R. 820 (W.D. Pa. 1992); In re *Plaid Pantries, Inc.*, 137 B.R. 405, 407 (D. Or. 1991), *aff'd on other grounds, Employers Ins. v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir. 1993); *Perlstein v. Rockwood Ins. Co. (In re AOV Indus., Inc.)*, 85 B.R. 183 (Bankr. D.D.C. 1988); *In re Saco Local Dev. Corp.*, 23 B.R. 644 (Bankr. D. Me. 1982), *aff'd*, 711 F.2d 441 (1st Cir. 1983). This Court, however, declines to take this approach in the instant case because it is contrary to the rule that priorities should be given a narrow, strict construction. *Montaldo*, 207 B.R. at 115. And ERISA begins its definition section by stating that the terms are "[f]or purposes of this subchapter," indicating that the reach of the definitions is only as far as the ERISA statute. 29 U.S.C. § 1002. Even though the Bankruptcy Code does not define "contributions to an employee benefit plan" it does not follow that the ERISA definition should be incorporated by this Court. This is a job for Congress. *Montaldo*, 207 B.R. at 115 (citing *HLM*, 183 B.R. at 855); *Official Labor Creditors Commn. v. Jet Florida Sys., Inc. (In re Jet Florida Sys., Inc.)*, 80 B.R. 544, 547 (S.D. Fla. 1987); *see also United States v. Reorganized CF & I*

(Cont'd)

(A) provides retirement income to employees, or

(B) results in a deferral of income by employees. . . .

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan. ERISA, Pub. L. No. 93-406, § 3(1), (2). (3). 88 Stat. 829, 833 (codified as amended at 29 U.S.C. § 1002(1), (2), (3)).

Fabricators, 116 S.Ct. 2106, 2112 (1996) (declining to presume that certain terms in Internal Revenue Code were used in a similar manner in Bankruptcy Code without statutory indication).

Significantly, ERISA does not provide the help that the Fund wants because 29 U.S.C. § 1003(b)(3) specifically excludes from ERISA coverage a "plan [that] is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws[.]" *See Combined Management, Inc. v. Superintendent of Bureau of Ins.,* 22 F.3d 1, 4 (1st Cir.), *cert. denied,* 513 U.S. 943 (1994) (stating that Congress explicitly exempted state workers' compensation schemes from ERISA's purview). Moreover, " '[t]he ERISA definition and associated court guidelines were designed to effectuate the purpose of ERISA, not the Bankruptcy Code.' " *HLM,* 62 F.3d at 226 (quoting *HLM,* 183 B.R. at 855); *see also* 29 U.S.C. § 1001(b) (stating that overall policy of ERISA is to protect the interests of participants in employee benefit plans and their beneficiaries).

The case law yields conflicting opinions as to how broadly to interpret the meaning of "contributions to an employee benefit plan." *See Montaldo,* 207 B.R. at 114 (citing cases illustrating split in authority); *see also HLM,* 62 F.3d at 227 (workers' compensation insurance premiums not entitled to priority); *Plaid Pantries,* 10 F.3d at 607 (workers' compensation premiums entitled to priority). Therefore, the Bankruptcy Court was correct in concluding that this undefined term of art is ambiguous, and we may look to the legislative history of the statute to determine its purpose and shed light on the meaning of the phrase at issue. *O'Connor v. United States Dep't of Energy,* 942 F.2d 771, 773 (10th Cir. 1991); *Roberts v. United States (In re Roberts),* 906 F.2d 1440, 1442 (10th Cir. 1990).

Appendix B

The legislative history states as follows:

> Paragraph (4) overrules *United States v. Embassy Restaurant*, 359 U.S. 29 (1958), which held that fringe benefits were not entitled to wage priority status. The bill recognizes the realities of labor contract negotiations, under which wage demands are often reduced if adequate fringe benefits are substituted. The priority granted is limited to claims for contributions to employee benefit plans such as pension plans, health or life insurance plans, and others, arising from services rendered after the earlier of one year before the bankruptcy case and the date of cessation of the debtor's business.

H.R. Rep. No. 95-595, at 357 (1977), *reprinted* in 1978 U.S.C.C.A.N. 5963, 6313 (footnote omitted); *see also* Sen. Rep. No. 95-989, at 69 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5855.

We agree with the Eighth Circuit that, "[t]he legislative history makes it clear that § 507(a)(4) covers those types of benefits that typically are bargained for in the employer-employee setting whether as part of a collective bargaining arrangement or otherwise." *HLM*, 62 F.3d at 226 (citing *HLM*, 165 B.R. at 41). The Bankruptcy Court in *Southern Star* concluded, and we agree, that § 507(a)(4) grants priority status to claims for contributions to employee benefit plans that are in the nature of bargained — for wage substitutes, which are truly "fringe benefits." *Southern Star*, 201 B.R. at 294.

This reasoning led the Bankruptcy Court to further conclude that since workers' compensation premiums are required to meet

an obligation imposed by the state, they were primarily for Southern Star's benefit, not its employees. This conclusion is in line with the Eighth Circuit's rationale when it stated

> "premiums for workers' compensation insurance are not 'contributions to an employee benefit plan,' which an employee may bargain for in lieu of higher wages, instead, . . . workers' compensation insurance is a system mandated by statute. Employers cannot offer (and employees cannot accept) higher wages as a substitute for workers' compensation benefits."

HLM, 62 F.3d at 226 (citing *HLM,* 165 B.R. at 40).

The purpose of the Oklahoma workers' compensation benefit scheme simply cannot be interpreted as a "fringe benefit" supplementing wages. In fact, the scheme was a compromise between workers and employers in which the workers gave up the right to sue for damages for work-related injuries, and the employers gave up certain defenses, such as the "fellow servant rule." *Carroll,* 579 P.2d at 830. The Oklahoma Supreme Court observed, [e]very common-law right of the workman has been abrogated, and another right substituted, not governed by common-law rules. . . . The injured workman can no longer use common-law rules . . . to extract compensation for injuries sustained by him." *Brooks v. A.A. Davis & Co.,* 124 Okla. 140, 254 P. 66, 70 (1926).

After considering the nature of workers' compensation insurance and the meaning of the terms used in § 507(a)(4), this Court holds that the priority was intended to be narrowly construed and applied to "fringe benefits" in lieu of wages. Accordingly, § 507(a)(4) was not intended to apply to unpaid

workers' compensation premiums such as those the Fund claims in this case.

The order of the Bankruptcy Court is hereby AFFIRMED.

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF OKLAHOMA GRANTING TRUSTEE'S OBJECTION TO PRIORITY STATUS OF CLAIM NO. 8 OF STATE INSURANCE FUND FILED OCTOBER 10, 1996

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. 94-71621

Chapter 7

IN RE:

SOUTHERN STAR FOODS, INC.,

Debtor.

ORDER GRANTING TRUSTEE'S OBJECTION TO PRIORITY STATUS OF CLAIM NO. 8 OF STATE INSURANCE FUND

This contested matter was submitted for decision upon stipulations and briefs. Upon consideration thereof, and of the record herein, this Court, pursuant to F.R.B.P. 7052 and 9014, now finds, concludes, and orders as follows.

FINDINGS OF FACT

The parties stipulate, and the Court finds, as follows.

Southern Star Foods, Inc. ("Southern Star") contracted with the State Insurance Fund ("the Fund") for workers' compensation

insurance coverage for the period between February 1, 1994 and November 17, 1994. Southern Star did not pay workers' compensation premiums due and owing to the Fund for the period between May 1, 1994 and November 17, 1994, in the total amount of $230,849.00. On or about November 17, 1994, Southern Star's workers' compensation insurance was cancelled.

On December 23, 1994, several creditors of Southern Star filed a petition for involuntary bankruptcy under 11 U.S.C. Chapter 7 against Southern Star in this Court. On January 11, 1995, an order for relief was entered in the case. On January 23, 1995, Kenneth G.M. Mather was appointed Trustee of Southern Star's Chapter 7 bankruptcy estate ("the Trustee"), and has continued to serve in that capacity to the present date.

On March 17, 1995, the Fund filed its Proof of Claim, which was numbered as Claim No. 8, asserting a priority unsecured claim under 11 U.S.C. § 507(a)(3), (4) in the amount of $230,849.00. On May 16, 1995, the Trustee filed his objection to Claim No. 8 and a brief in support thereof, contesting only the priority status of the claim, and asking that it be allowed as a nonpriority ("general") unsecured claim in the amount of $230,849.00. On June 12, 1996, the Fund filed its ". . . Response . . . "thereto, abandoning any argument for priority status under 11 U.S.C. § 507(a)(3), conceding the nonpriority status of part of its original claim as specified below, but pressing its claim for priority status under § 507(a)(4) of the balance as specified below.

Southern Star did not cease business before the date of filing of the involuntary petition. Therefore, any priority claim of the Fund under § 507(a)(4) had to be incurred within 180 days of the date of filing of the involuntary petition, i.e. from June 26, 1994 forward. Of the Fund's total claim of $230,849.00, $43,950.73

was incurred before June 26, 1994, i.e. outside the 180-day priority period; and the balance of $186,898.27 was incurred from June 26, 1994 to November 17, 1994, i.e. inside the 180-day priority period.

On June 27, 1996, the Court held a status conference on the matter, and with the agreement of the parties issued a Scheduling Order providing for the filing of stipulations of fact, briefs and response briefs, upon which the matter would be submitted for decision. On July 19, 1996, the parties filed their joint "Stipulations of Facts For Trial." On July 31, 1996, each party filed a ". . . Supplemental Brief. . . "Further briefs were permitted on or before August 9, 1996; but none were filed. Thereafter, the Court took the matter under advisement.

CONCLUSIONS OF LAW

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B), (O), 11 U.S.C. §§ 502(b), 507(a)(4).

The Fund concedes that the $43,950.73 incurred before June 26, 1994 should be allowed only as a general unsecured claim; but it argues that the balance of $186,898.27 should be allowed as a priority unsecured claim under § 507(a)(4). That statute grants fourth priority status to

> . . . allowed unsecured claims for contributions to an employee benefit plan . . . arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first . . .

The Fund proposes that unpaid workers' compensation insurance premiums are "contributions to an employee benefit plan" within

the meaning of this statute, citing *Employers Insurance of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir. 1993). The Trustee argues that they are not, citing *In re HLM Corp.*, 62 F.3d 224 (9th Cir. 1995) *aff'g* 183 B.R. 852 (D. Minn. 1994) *aff'd* 165 B.R. 38 (Bankr. D. Minn. 1994).

As usual in disputes over the priority of claims, this Court finds itself "involve[d in] the thankless task of determining who should share the losses incurred by an unsuccessful business and how the values of the estate should be apportioned among creditors . . . ," S.Rep. No. 95-989 (1978) p. 10, U.S. Code Cong. & Admin. News (1978) pp. 5787, 5796. Priority status is not favored not because Bankruptcy Courts condone such conduct as nonpayment of workers' compensation premiums (for this Court certainly does not condone it), but because the most basic bankruptcy policy is equal treatment of creditors, *In re Hancock*, 137 B.R. 835, 837-838 (Bankr. N.D. Okl. 1992), and priority status violates that policy, by giving a few favored creditors better treatment than others. This is done for reasons of special expediency, *In re First Security Mortgage Co., Inc.*, 117 B.R. 1001, 1004 (Bankr. N.D. Okl. 1990). There is not enough money in Southern Star's estate to satisfy all claims of all the creditors of Southern Star; and

> To the extent one creditor's losses are mitigated by giving it a prior claim on inadequate estate assets, other creditors' losses will be aggravated,

id. citing *In re Mid Region Petroleum, Inc.*, 111 B.R. 968, 972 (Bankr. N.D. Okl. 1990). In such unfortunate circumstances, priority status is awarded only where it is so strongly deserved as to override the claims of all other creditors to equal treatment.

Appendix C

The issue is essentially whether the statutory phrase "contributions to an employee benefit plan" should be construed narrowly to exclude, or broadly to include, unpaid workers' compensation insurance premiums. The phrase appears to be a term of art, is undefined by the Bankruptcy Code itself, may be read either narrowly or broadly, and in these circumstances must be considered ambiguous, *In re Heckathorn,* 199 B.R. 188, 194-95 (Bankr. N.D. Okl. 1996).

Legislative history reveals that § 507(a)(4) was intended as a specific variation on § 507(a)(3). Subsection (3) grants third-priority status to claims within a fixed amount for "wages, salaries, or commissions. . ." Its predecessor under the former Bankruptcy Act was Sec. 64a(2). In *United States v. Embassy Restaurant, Inc.,* 359 U.S. 29, 79 S.Ct. 554, 3 L.Ed.2d 601 (1959), the United States Supreme Court held that Sec. 64a(2) did not apply to "contributions by an employer to a union welfare fund which are required by a collective bargaining agreement," and by extension to other "fringe benefits," 359 U.S. pp. 29, 33, 79 S.Ct. 554, 556, 3 L.Ed.2d pp. 602, 604. In the new Bankruptcy Code, former Sec. 64a(2) became new § 507(a)(3), supplemented by new subsection (a)(4).

> Paragraph (4) overrules *United States v. Embassy Restaurant* . . . which held that fringe benefits were not entitled to wage priority status. The bill recognizes the realities of labor contract negotiations, where fringe benefits may be substituted for wage demands. The priority granted is limited to claims for contributions to employee benefit plans such as pension plans, health or life insurance plans, and others . . The dollar limit placed on the total of all contributions payable under this paragraph is equal to the difference between the

> maximum allowable priority under paragraph (3) . . . times the number of employees covered by the plan less the actual distributions under paragraph (3) with respect to these employees,

S.Rep. No. 95-989, 95th Cong., 2nd Sess. (1978) p. 68, U.S. Code Cong. & Admin. News 1978, p. 5855.

That is, § 507(a)(4) was intended to grant priority status to such "claims for contributions to an employee benefit plan" as are in the nature of bargained-for wage substitutes or "fringe benefits," which are not within the letter of the previous § 507(a)(3) but are within its spirit.

This description does not fit claims for unpaid workers' compensation premiums. Workers' compensation is not bargained for by employees; it is required by the State. It cannot be bargained away; it is not a substitute for employee wages, but an obligation which employers must meet, no matter what wage levels they may pay. In this sense, the premium payments were primarily for Southern Star's own benefit.

The Fund describes Oklahoma's workers' compensation scheme as "social legislation," brief p. 16, but asserts that "there is no fund set up to pay the workers' compensation benefits in the case where the employer is not insured," *id.* p. 14. Southern Star did not meet its obligations to maintain current payments on workers' compensation insurance; the State of Oklahoma did not provide any remedy of its own for workers left uninsured. The question is whether Southern Star's general unsecured creditors should be forced (1) to bear the burden of Southern Star's mismanagement, and (2) to give their money (i.e., money which would otherwise be paid to them in partial satisfaction of their claims) to plug the gaps in Oklahoma's "social legislation". This Court perceives no reason why they should.

Appendix C

The Court concludes that 11 U.S.C. § 507(a)(4) was intended to be narrowly construed and applied to "fringe benefits" in lieu of wages, and was not intended to apply to unpaid workers' compensation premiums such as those claimed by the Fund in this case. Accord, *In re HLM* Corp., supra.

Accordingly, the Trustee's objection to priority status of Claim No. 8 of the State Insurance Fund is hereby sustained. Said claim is allowed in the amount claimed, but only as a general unsecured claim not entitled to priority.

AND IT IS SO ORDERED.

Dated: October 10, 1996

s/ Mickey D. Wilson
MICKEY D. WILSON, JUDGE
UNITED STATES BANKRUPTCY COURT

cc: Pamela H. Goldberg (Hall, Estill et al.)
Rodney Hayes (State Insurance Fund)

MOTION FILED

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(2)

No. 98-310

In The

Supreme Court of the United States

October Term, 1997

THE STATE INSURANCE FUND,

Petitioner,

vs.

KENNETH G.M. MATHER, TRUSTEE for the ESTATE OF SOUTHERN STAR FOODS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC., HARTFORD FIRE INSURANCE COMPANY, AND TRAVELERS INDEMNITY COMPANY IN SUPPORT OF GRANTING THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF

Pursuant to Rule 37.2(b) of the Rules of this Court, *amici* The National Council on Compensation Insurance, Inc. ("NCCI"), Hartford Fire Insurance Company ("Hartford"), and Travelers Indemnity Company ("Travelers") hereby move for leave to file the accompanying brief. Petitioner has granted but Respondent has refused consent to the filing of the accompanying brief in this case.[1]

NCCI provides administrative and financial services to various state workers' compensation insurance plans, and to various workers' compensation reinsurance pooling arrangements, including the largest such pool, the National Workers' Compensation Reinsurance Pool (the "National Pool"). In general, the National Pool must pay claims on policies that it reinsures, even if it cannot collect the premiums. Hence, unpaid premiums represent a loss to the National Pool. As the administrator of the National Pool and various state plans, NCCI has a substantial interest in the resolution of the issue presented in this case over whether claims for unpaid premiums for workers' compensation insurance are entitled to priority under section 507(a)(4) of the Bankruptcy Code, 11 U.S.C. § 507(a)(4).

Hartford and Travelers are insurance carriers that write workers' compensation insurance in each of the fifty states in both the voluntary and residual markets. The voluntary markets encompass the sale of insurance to employers who meet certain underwriting standards. The residual markets encompass the sale of insurance to employers who do not meet these standards but

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1. *Amici* file herewith the written consent of Petitioner to the submission of this brief. Counsel for a party did not author this brief in whole or in part and no person or entity, other than an *amicus curiae*, its members, or counsel, have made a monetary contribution to the preparation or submission of this brief.

may acquire workers' compensation insurance through participation in an assigned risk pool. In general, Hartford and Travelers pay covered claims on workers' compensation insurance that they write in exchange for prospective and retrospective premium payments from insureds. When premiums are not timely paid by an insured, Hartford and Travelers attempt to collect and may cancel the workers' compensation insurance. Where Hartford and Travelers are unable to collect premiums owed to them (particularly from bankrupt insureds), they may suffer losses. Accordingly, both carriers have an interest in the outcome of this matter.

Amici contend that the Court should grant the petition for three principal reasons. First, the decision of the Court of Appeals for the Tenth Circuit clearly deepens a pre-existing conflict among the Courts of Appeals on the issue of whether claims for unpaid workers' compensation insurance premiums are entitled to priority treatment under section 507(a)(4). The Court should resolve the conflict because the disarray in the case law is only likely to worsen with the passage of time at considerable cost in terms of unnecessary litigation expense, higher premiums for workers' compensation insurance, reduced availability for such insurance, and less flexibility in addressing the needs of financially troubled debtors.

Second, the court below decided the priority question in a way that conflicts with applicable decisions of this Court regarding the construction of statutes in the bankruptcy context. The court below concluded that, although section 507(a)(4) applies to employee benefits that are required by contract (i.e., a collective bargaining agreement), it does not apply to benefits mandated by statute. The text of section 507(a)(4), however, draws no distinction between contractual and statutory benefits. Nor can such a distinction be created out of the legislative materials. Hence, the lower court's interpretation of the statute is unsound.

Third, the court below decided an important question of federal law which has not been, but should be, settled by this Court at this time. The uncertainty and cost associated with the current status of the case law undermines important bankruptcy policies, and may be cured by the simple expedient of resolving the split of authority over the scope of section 507(a)(4).

Although the petition filed by the Oklahoma State Insurance Fund provides a substantial basis for granting a writ of certiorari in this instance, the petition does not address certain critical points. These additional points, discussed more fully in the accompanying brief, provide compelling support for the Fund's position. Accordingly, the *amici* respectfully request that the Court grant leave to file the accompanying brief.

Respectfully submitted,

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BRIEF OF THE *AMICI CURIAE*

Amici Curiae the National Council on Compensation Insurance, Inc. ("NCCI"), Hartford Fire Insurance Company ("Hartford"), and Travelers Indemnity Company ("Travelers") submit this brief in support of the petition filed by the Oklahoma State Insurance Fund (the "Fund") for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

STATEMENT OF INTEREST

NCCI provides administrative and financial services to various state workers' compensation insurance plans, and to various workers' compensation reinsurance pooling arrangements, including the largest such pool, the National Workers' Compensation Reinsurance Pool (the "National Pool"). In general, the National Pool must pay claims on policies that it reinsures, even if it cannot collect the premiums. Hence, unpaid premiums represent a loss to the National Pool. As the administrator of the National Pool and various state plans, NCCI has a substantial interest in the outcome of the pending case.

Hartford and Travelers are insurance carriers that write workers' compensation insurance in each of the fifty states in both the voluntary and residual markets. The voluntary markets encompass the sale of insurance to employers who meet certain underwriting standards. The residual markets encompass the sale of insurance to employers who do not meet these standards but may acquire workers' compensation insurance through participation in an assigned risk pool. In general, Hartford and Travelers pay covered claims on workers' compensation insurance that they write in exchange for prospective and retrospective premium payments from insureds. When premiums are not timely paid by an insured, Hartford and Travelers attempt to collect and may cancel the workers'

compensation insurance. Where Hartford and Travelers are unable to collect premiums owed to them (particularly from bankrupt insureds), they may suffer losses. Accordingly, both carriers have an interest in the outcome of this matter.

STATEMENT

On December 23, 1994, several creditors of the debtor Southern Star Foods, Inc. ("Southern Star") placed the company into involuntary bankruptcy proceedings. Prior to this date, the Fund supplied Southern Star with workers' compensation insurance for the benefit of Southern Star's employees. When Southern Star failed to pay the premiums for this insurance, the Fund cancelled coverage.

After the commencement of the bankruptcy proceedings, the Fund filed a proof of claim with the bankruptcy court for the unpaid premiums. The Fund asserted that its claim was entitled to priority under section 507(a)(4) of the Bankruptcy Code as a claim for "contributions to an employee benefit plan." The bankruptcy court entered an order denying the priority. On appeal, the bankruptcy appellate panel affirmed, as did the Court of Appeals for the Tenth Circuit.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT DEEPENS AN IRRECONCILABLE CONFLICT BETWEEN THE COURTS OF APPEALS ON THE ISSUE OF WHETHER A CLAIM FOR UNPAID PREMIUMS FOR WORKERS' COMPENSATION INSURANCE CONSTITUTES A CLAIM FOR "CONTRIBUTIONS TO AN EMPLOYEE BENEFIT PLAN" WITHIN THE MEANING OF SECTION 507(a)(4).

The decision of the Court of Appeals for the Tenth Circuit denying the Fund's claim to priority under section 507(a)(4) for unpaid premiums for workers' compensation insurance deepens a pre-existing conflict among the Courts of Appeals on the same issue. Because of this irreconcilable conflict, the decisions of the Courts of Appeals stand in considerable disarray.

One line of authority holds that claims for unpaid premiums for workers' compensation insurance are entitled to priority regardless of whether the provision of the insurance is mandated by statute or required by contract. *See Employer's Ins. of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605, 607-08 (9th Cir. 1993) (holding that workers' compensation insurance qualifies as an "employee benefit plan" and concluding that Congress drew no distinction between benefits that are contractually promised and those, like workers' compensation insurance, that are statutorily required). Similarly, the Court of Appeals for the First Circuit has concluded that claims for unpaid insurance premiums for employee life, health, and disability coverage are entitled to the statutory priority, regardless of whether the

insurance is required by statute or agreement. *See In re Saco Local Dev. Corp.*, 711 F.2d 441, 448 (1st Cir. 1983) (holding that section 507(a)(4) applies to a claim for unpaid premiums for employee life, health, and disability insurance, and that the statute applies broadly to "cover plans that are not the product of collective bargaining"); *see also In re Terex Corp.*, 984 F. 2d 170, 171 (6th Cir. 1992) (stating that insurer's claim for unpaid insurance premiums had priority status under section 507(a)(4)). Numerous lower courts have followed the logic of these precedents. *See In re CirrusCorp*, 196 B.R. 76, 77 (S.D. Tex. 1996) (holding that claims for contributions to employee benefit plans, including medical insurance, have priority under section 507(a)(4)); *In re Braniff, Inc.*, 218 B.R. 628, 635 (Bankr. M.D. Fla. 1998) (concluding that benefit programs mandated by statute, such as some workers' compensation programs, are employee benefit plans, even though they are not "bargained for" because they supply benefits to employees); *In re Lummus Indus., Inc.*, 193 B.R. 615, 618 (Bankr. M.D. Ga. 1996) (noting that courts have interpreted section 507(a)(4) broadly to include premiums paid by employers for employee insurance plans); *In re Gerald T. Fenton, Inc.*, 178 B.R. 582, 584-87 (Bankr. D.D.C. 1995) (concluding that, in order to qualify for priority status, the plan need not be the product of a collective bargaining agreement, and that payments required to be made pursuant to a statutorily mandated plan can be considered as "contributions" within the meaning of section 507(a)(4)); *In re AOV Indus., Inc.*, 85 B.R. 183, 186 (Bankr. D.D.C. 1988) (holding that insurance coverage provided by a debtor's workers' compensation insurer qualifies as "an employee benefit plan" under section 507(a)(4)); *In re Allegheny Inter'l, Inc.*, 138 B.R. 171, 175 (Bankr. W.D. Pa. 1992) (relying on *Plaid Pantries* and holding that claims for unpaid premiums for life, disability, accidental death, and dismemberment insurance are claims for "contributions to an employee benefit plan"), *aff'd sub nom. Allegheny Inter'l, Inc. v. Metropolitan Life Ins. Co.*, 145 B.R. 820 (W.D. Pa. 1992).

In contrast, a conflicting line of authority holds that claims for unpaid premiums for workers' compensation insurance are not entitled to priority under section 507(a)(4) if the insurance is mandated by statute. *See State Ins. Fund v. Southern Star Foods, Inc. (In re Southern Star Foods, Inc.)*, 144 F.3d 712, 716 (10th Cir. 1998) (holding that claims for unpaid premiums for workers' compensation insurance are not entitled to priority because insurance of this type is not a fringe benefit that an employee can bargain for "in lieu of higher wages"); *Employer's Ins. of Wausau v. Remette (In re HLM Corp.)*, 62 F.3d 224, 226 (8th Cir. 1995) (holding that unpaid premiums for workers' compensation insurance do not constitute "contributions to an employee benefit plan" because the insurance is mandated by statute, and, thus, the "contributions" do not "benefit" the employee but, rather, benefit the employer by fulfilling the employer's statutory obligation). Other courts have adopted the same reasoning. *See In re Birmingham Nashville Express, Inc.*, 221 B.R. 194, 196-197 (M.D. Tenn. 1998) (finding, among other things, that insurer's claim for unpaid workers' compensation insurance premiums did not qualify for the priority set out in section 507(a)(4) because the employees are not the beneficiaries of the workers' compensation insurance); *In re Allentown Moving & Storage, Inc.*, 214 B.R. 761, 764-765 (Bankr. E.D. Pa. 1997) (relying on *HLM Corp.* and holding that a claim for unpaid premiums for workers' compensation insurance is not entitled to priority); *In re The Montaldo Corp.*, 207 B.R. 112, 114-116 (Bankr. M.D.N.C. 1997) (holding that a claim by an insurer for unpaid premiums for group life and health insurance is not entitled to priority), *rev'd sub nom. Aetna Life Ins. Co. v. Montaldo Corp.*, Dkt. No. 2:97CV00139 (M.D.N.C. July 16, 1997); *In re AER-Aerotron, Inc.*, 182 B.R. 725, 727 (Bankr. E.D.N.C. 1995) (holding that a claim for unpaid premiums of a debtor's group health, dental, and term life policies is not entitled to section 507(a)(4) priority); *In re Arrow Carrier Corp.*, 154 B.R. 642, 646 (Bankr. D.N.J. 1993)

(concluding that it was not Congress' intent to grant priority to unpaid premiums for workers' compensation coverage).

The Court should resolve the conflict among the lower courts regarding the construction of section 507(a)(4) because the disarray in the case law will only worsen with the passage of time. In addition, permitting the conflict to continue is not likely to provide additional insight into how the conflict should be resolved because the courts have already explored the relevant issues extensively, and now simply repeat the same points over and over again. Thus, leaving the question for further judicial development in the lower courts is not likely to be helpful to the Court's ultimate resolution of the problem. Accordingly, the Court should grant the writ and resolve the conflict at this time.

II.

THE COURT OF APPEALS FOR THE TENTH CIRCUIT DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT ON MATTERS OF STATUTORY INTERPRETATION.

The court below reasoned that workers' compensation insurance does not qualify as an "employee benefit" within the meaning of section 507(a)(4) on the ground that workers' compensation insurance is typically mandated by state statute and, thus, does not constitute "a fringe benefit that an employee can bargain for, either explicitly or impliedly, in lieu of higher wages." *In re Southern Star Foods, Inc.*, 144 F.3d at 716. Hence, the court concluded, workers' compensation insurance "is not a fringe benefit or a wage substitute, as contemplated by Congress in enacting § 507(a)(4)." *Id.*

By construing section 507(a)(4) as applicable only to benefits that an employee may bargain for, the court below departed from norms of statutory construction established by this Court. In interpreting the provisions of the Bankruptcy Code, this Court has instructed that the lower courts are not free to superimpose on sections of the Code a distinction between statutory and contractual rights where the Code itself draws no such distinction. For example, in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), the Court considered a split of authority over the proper construction of section 506(b) of the Bankruptcy Code, 11 U.S.C. § 506(b) (1994). This section permits oversecured creditors to recover interest on their claims accruing after the debtor files for bankruptcy protection. *See id.*; *Ron Pair*, 489 U.S. at 240. Some courts had concluded that section 506(b) applied only to secured creditors who held contractual security interests, and not those holding statutory liens. *See Ron Pair*, 489 U.S. at 240. Concluding that section 506(b) draws no such distinction, the Court disapproved the difference in treatment, stating "where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *Id.* at 241 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

Similarly, in construing the provisions of the Bankruptcy Code, the Court has instructed that the lower courts are not at liberty to adopt interpretations that result in the categorical treatment of classes of claims at a level reserved for the legislature. *See United States v. Noland*, 517 U.S. 535, 536, 543 (1996) (ruling that a bankruptcy court could not subordinate all governmental claims for noncompensatory tax penalties "on a categorical basis in derogation of Congress's scheme of priorities" because courts are not free to establish the categorical treatment of classes of claims "at the level of policy choice at which Congress itself operates in drafting the Bankruptcy Code."). That, however, is precisely what the court below has

done. Nothing in section 507(a)(4) restricts its application to employee benefit plans that are of a "bargained for" nature. Excluding "statutory" employee benefit programs from the scope of section 507(a)(4) sets up a categorical distinction that only Congress can create.

In addition, the Court has instructed that different provisions of the Bankruptcy Code should be construed consistently, and not in a fashion that renders an absurd interpretation. *See Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 20 (1995) (construing section 553 of the Bankruptcy Code in light of section 542(b), and rejecting an interpretation of section 553 that would conflict with section 542(b), reasoning "[i]t is an elementary rule of construction that 'the act cannot be held to destroy itself.' ") (citation omitted); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (observing in the context of the Bankruptcy Code that "[s]tatutory construction . . . is a holistic endeavor"); *see also United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("Over and over we have stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law and to its object and policy.' ") (citation omitted). In this case, however, the decision of the court below violates these principles. This is perhaps best illustrated by a comparison of section 507(a)(4) with the wage priority provision of section 507(a)(3).

Many (if not all) states require employers to pay their employees for work that the employees have performed, and this obligation is often backed by criminal sanctions. *See, e.g.*, Conn. Gen. Stat. § 31-71b (1997) (stating that, "[e]xcept as otherwise provided . . . each employer, by himself, his agent or representative, shall pay weekly all moneys due each employee . . ."); Conn. Gen. Stat. § 31-71g (1997) (providing

that employers who violate § 31-71b are subject to a fine or imprisonment or both); N.Y. Lab. Law § 191 (McKinney 1998) (describing obligation to pay wages); N.Y. Lab. Law § 198-a (McKinney 1998) (providing criminal sanction for failure to pay wages); Colo. Rev. Stat. § 8-4-117 (1998) (same). Yet, it cannot be true that a wage claim falls outside the scope of the wage priority provided by section 507(a)(3) simply because the payment of wages is statutorily directed.[1] Similarly, section 507(a)(4) draws no distinction between employee benefits that are mandated by statute and those that are not, and any such distinction makes no more sense in the context of section 507(a)(4) than it would in the context of section 507(a)(3).

Finally, the court below looked improperly to the legislative history of section 507(a)(4) to create a limitation on the section's applicability that does not appear in the statutory text. First, the creation of exceptions not evident from the text is strongly disfavored. *See, e.g., Toibb v. Radloff*, 501 U.S. 157, 161 (1991) (in declining to create an exception to the general availability of bankruptcy relief where no such exception appears in the text of the Bankruptcy Code, the Court concluded "Congress knew how to restrict recourse to the avenues of bankruptcy relief"); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522-23 (1984) (in declining to except collective bargaining agreements from the general provisions of section 365 of the Bankruptcy Code, the Court stated "[o]bviously, Congress knew how to draft an exclusion for collective bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress intended that § 365(a) apply to all collective bargaining agreements"); *see also United States v. American*

1. Likewise, it is inconceivable that a legislative enactment requiring the provision of employee medical insurance would alter the applicability of section 507(a)(4) to unpaid premiums for such insurance in the absence of a specific congressional direction to that effect.

Bell Tel., 159 U.S. 548, 549-50, 554 (1895) (stating that, where the scope of the statute "is described in general terms so as to comprehend the particular case, no presumption can be indulged of an intention to oust or restrict such jurisdiction").

Second, reference to the legislative history simply does not support the creation of an exception for benefits that are mandated by statute. It is true, of course, that the legislative materials mention the subject of contractual labor negotiations. Specifically, the relevant House and Senate reports state: "The bill recognizes the realities of labor contract negotiations, under which wage demands are often reduced if adequate fringe benefits are substituted." H.R. REP. No. 95-595, at 357 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313; S. REP. No. 95-989, at 69 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5855. But as a matter of statutory construction, the mere reference to "the realities of labor contract negotiations" does not translate into an affirmative exclusion of mandatory employee benefits from the scope of section 507(a)(4) — the expression of *one* consideration behind section 507(a)(4) cannot be taken as the *exclusive* reason for the section's existence where neither the statute nor the legislative history so provide.

Moreover, reference to the legislative history actually supports the conclusion that Congress did not intend workers' compensation benefits to be excluded from the scope of section 507(a)(4). The legislative materials indicate that employee benefits such as pension, health, life and disability insurance are *nonexhaustive* examples of the kinds of benefits covered by section 507(a)(4). *See* H.R. REP. No. 95-595, at 187 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6148 (stating that the priority under section 507(a)(4) "will include health insurance programs, life insurance plans, pension funds, and all other forms of employee compensation that is not in the form of wages."); *see also* H.R. REP. No. 95-595, at 357 (1977),

reprinted in 1978 U.S.C.C.A.N. 5963, 6313 (observing that the priority granted pursuant to section 507(a)(4) encompasses "contributions to employee benefit plans such as pension plans, health or life insurance plans, and others"). Given that these lists are intentionally nonexhaustive, there is no reason to infer from them that Congress intended to except workers' compensation insurance from the scope of section 507(a)(4). Indeed, workers' compensation insurance plans also provide certain health, life, and disability coverage to employees precisely as contemplated by Congress in its discussion of the scope of section 507(a)(4).

Ultimately, workers' compensation plans provide a benefit to employees regardless of whether the coverage is mandated by statute or dictated by contract. Certainly, in calculating a business' total labor costs attributable to employee benefits, employers include the cost of workers' compensation insurance just as they would any other type of employee insurance program. The fact that the benefit is mandated by statute cannot serve as a basis for disqualification under section 507(a)(4) where neither the statute nor its legislative history impose such a restriction.

III.

THE COURT BELOW DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT AT THIS TIME.

It is undeniable that uncertainty regarding the collectibility of premiums for workers' compensation insurance renders this insurance more expensive. To the extent collection is uncertain, there will be a corresponding increase in price notwithstanding the existence of an erstwhile statutory priority because any

uncertainty over the statute's interpretation requires a discounting of the statute's effectiveness. Similarly, the current uncertainty generates significant litigation costs as parties fight over the status of the current law, also increasing the expense of the insurance.

The increased cost associated with uncertainty is, in turn, detrimental to at least two important bankruptcy policies. First, because workers' compensation insurance is more costly than it would be if the statutory uncertainty were removed in favor of recognizing the priority, fewer businesses will be able to afford workers' compensation insurance, particularly those at risk of bankruptcy. As a result, some workers may lose compensation coverage for their injuries, particularly if their employers become financially unstable. This result stands in direct contravention of Congress' intent in enacting section 507(a)(4), which is to promote the availability and continuance of employee benefits.

Second, denying priority for unpaid premiums for workers' compensation insurance will leave insurers with less flexibility in dealing with insureds in financial difficulty. For example, without the priority, insurers may be forced to require prepayment of premiums or some other form of collateral security in order to avoid the increased risk of holding a general unsecured claim rather than a priority claim. Denial of a priority for unpaid premiums would also lead to earlier termination of workers' compensation policies by insurers seeking to reduce their exposure to financially troubled insureds. Because workers' compensation insurance is mandatory in most states, any tightening of credit terms or early termination of coverage would necessarily place additional strain on insureds seeking to avoid bankruptcy. These results are also inconsistent with the purpose of section 507(a)(4).

Third, because businesses must have workers' compensation insurance in order to operate, a decrease in the availability of this insurance will make it more difficult for businesses to reorganize. Such a result undermines the important bankruptcy policy of rehabilitating business enterprises for the benefit of all concerned. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1983) ("the policy of Chapter 11 is to permit successful rehabilitation of debtors"); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983) ("Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if 'sold for scrap.' "); H.R. REP. No. 95-595, at 220 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179 ("The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders.").

Finally, differences across jurisdictional lines in the treatment of similar claims create significant anomalies in the fixing of premiums, rates and other charges, particularly when multiplied by the thousands of bankruptcy petitions filed each year in each of the circuits. Of course, this and the other unfortunate consequences discussed above are avoidable by the simple expedient of clarifying the meaning of section 507(a)(4). Hence, the question raised in this case is an important one that should be resolved by this Court at this time.

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1997

THE STATE INSURANCE FUND,

Petitioner,

vs.

KENNETH G.M. MATHER, TRUSTEE for the ESTATE OF SOUTHERN STAR FOODS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner has framed the question before this Court as follows: "[d]oes the [workers' compensation] insurance that Southern Star procured for its employees constitute an employee benefit plan such that the Fund's claim for unpaid premiums is entitled to priority status under section 507 (a)(4) [of the United States Bankruptcy Code]"? Respondent asserts that the issue determined by the United States Court of Appeals for the Tenth Circuit (the "Tenth Circuit"), in *In re Southern Star Foods, Inc.*, 144 F.3d 712 (10th Cir. 1998) is qualitatively different. The Tenth Circuit framed the issue before it as whether premiums for workers' compensation insurance are "contributions to an employee benefit plan." Respondent submits that the word "contribution" is at the heart of the matter and, therefore, a critical aspect of this Court's analysis.

PARENTS/SUBSIDIARIES OF CORPORATE RESPONDENTS

Respondent, as the bankruptcy trustee for the bankruptcy estate of Southern Star Foods, Inc. ("Southern Star"), informs the Court that Southern Star has no parent or subsidiary companies.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Kenneth G.M. Mather, the duly authorized and appointed trustee of the bankruptcy estate of Southern Star Foods, Inc., respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari (the "Petition"), seeking review of the Tenth Circuit's opinion in this case.

REASONS FOR DENYING CERTIORARI

Petitioner asserts that review on certiorari is appropriate because this case involves "an important issue of unsettled federal bankruptcy law which has not previously been before this Court" and because the circuit courts of appeals that have considered the issue have rendered contradictory decisions which represent an irreconcilable conflict. Petition at pp. 2, 6. Respondent respectfully disagrees that the instant case merits review on certiorari.

While the issue before the Court has the potential of affecting the administration of a bankruptcy case, the present importance of the issue is substantially diminished by the fact that the "dissenting" circuit court opinion was the first to be rendered and has been largely rejected. Moreover, it would appear that the issue in "true" conflict between the circuit courts is a very narrow one that is likely to have little impact on most bankruptcy cases. Alternatively, it would appear that the "dissenting" circuit court opinion arises more logically from a misapplication of the law than a misinterpretation of the law.

I. This Court's Grounds For Certiorari.

This Court's Rule 10 sets forth the considerations governing review on certiorari and provides, in pertinent part, as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . .
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The above text of Rule 10 contains certain critical changes that were made in 1995. The 1995 revision to Rule 10 replaced the descriptive words "special and important" with the word "compelling." Also, the last sentence of Rule 10, setting out two circumstances under which the Court rarely grants certiorari, was added in 1995. These changes appear to have had the purpose of narrowing the grounds pursuant to which certiorari will be granted.

The following may be gleaned from the language of Rule 10. In the instant case, Petitioner has the burden of showing this Court that there is a compelling reason to support review on certiorari, which may or may not be

satisfied by an asserted conflict among the decisions of a number of circuit courts of appeals. Further, the error asserted by Petitioner must be more than a misapplication of a properly stated rule of law. Respondent respectfully submits that Petitioner has not satisfied these burdens, and the Petition should be denied.

II. The Instant Case Lacks The Compelling Reasons Warranting Review On Certiorari.

The following excerpts from Petitioner's "Statement of the Case" comprise Petitioner's attempt to illustrate that there are compelling reasons to grant certiorari.

> This case presents an important issue of unsettled federal bankruptcy law which has not previously been before this Court. . . . Resolution of this issue will have far-reaching ramifications for workers, employers and insurers. Virtually all fifty states have some type of mandatory workers' compensation system to protect workers injured on the job. Much of that protection is provided through workers' compensation insurance. Accordingly, as employers continue to suffer financial difficulties and seek the protection of the Bankruptcy Code, issues regarding the priority to be granted workers' compensation insurers' claims will continually arise.
>
> * * *
>
> This conflict affects far more than the insurance industry, it also affects the thousands of laborers whose employers provide them with insurance coverage. If an employer does not maintain that insurance by paying premiums as they become

> due, employees are (in most states) left completely unprotected if they become ill or are injured on the job, because in bankruptcy there may be no other source from which they can collect benefits. By paying premiums the employer secures for its employees the benefit of insurance for workplace illness or injury without regard to fault. The presence of a workers' compensation insurance premium priority will – like all other employee benefit priorities – encourage insurance carriers to continue to do business with financially troubled employers, enabling them to retain employees and perhaps even avoid bankruptcy.

Petition at pp. 2-4.

Petitioner misperceives the importance and the impact of the issue before this Court. Further, Petitioner's attempt to characterize the present issue as a new or novel one is disingenuous. Workers' compensation laws and the federal bankruptcy laws have long existed. Indeed, § 507(a)(4) of the Bankruptcy Code, the statute at issue herein, was enacted in 1978. Notwithstanding its existence for twenty years, the courts that have directly considered the present question are a mere handful. This might be surprising considering the probability of such claims existing in the typical business bankruptcy case, for it is only logical to assume that when an employer files for bankruptcy relief, many of its debts have gone unpaid, including debts owed to a workers' compensation insurance carrier. However, Respondent respectfully submits that the dearth of case law on this issue is more indicative of the clarity of § 507(a)(4) and its legislative

history, as well as the general recognition that workers' compensation issues are the province of state law.

Whether or not an employer complies with workers' compensation laws and the resulting effects on that employer's employees are precisely a part of the subject matter such laws are designed to address. Petitioner would have this Court, by "judicially legislating" changes to § 507(a)(4), give deference to the various state public policies that might underlie workers' compensation laws in "virtually all fifty states." However important and admirable workers' compensation laws may be at the various state levels, such laws and the policies behind them are simply irrelevant to considerations involving the priorities to be afforded in a bankruptcy setting. It is neither the goal nor the function of federal bankruptcy laws to cure the ills of these employer/employee issues. Moreover, Petitioner's position is inherently illogical. Assuming *arguendo* claimants such as Petitioner are entitled to priority treatment in bankruptcy, such treatment does nothing to ensure that the employer has complied with workers' compensation laws and employees are fully protected. In fact, the only reason such claims exist is because precisely the opposite has happened and the employer has failed to ensure the continuation of its workers' compensation coverage. Moreover, to allow the workers' compensation insurer priority treatment in bankruptcy benefits the insurer but has absolutely no beneficial effect on the employer (who is in bankruptcy, usually out of business, and unconcerned whether its insurer gets priority treatment) or the employees (who have either had their claims covered while the insurance was in force or are left with their own available remedies

in bankruptcy). Simply put, the possible payment[1] of the priority claim to the insurer does not inure to the benefit of employers or employees.

Petitioner argues that the presence of a workers' compensation insurance premium priority will: (1) encourage insurance carriers to continue to do business with financially troubled employers, (2) enable employers to retain employees, and (3) even enable employers to avoid bankruptcy. Petition at pp. 3-4. Such arguments are likewise illogical and belied by the facts of the case below. Petitioner canceled Southern Star's workers' compensation insurance on November 17, 1994 because Southern Star had failed to pay the premiums. An involuntary bankruptcy petition was filed against Southern Star on December 23, 1994. Petitioner filed a proof of claim in the bankruptcy case asserting a priority claim. Notwithstanding Petitioner's belief that it had a priority claim for its unpaid workers' compensation insurance premiums, it still canceled Southern Star's insurance coverage for non-payment of premiums. Petitioner apparently made a business decision that it no longer was going to take the risk of continuing to do business with Southern Star despite its belief (assuming it even thought about it) that it would have a priority claim in bankruptcy. After all, there is no guarantee that even priority claims will be paid in a Chapter 7 bankruptcy case.

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[1] There is certainly no guarantee in a Chapter 7 case, and little possibility in a no-asset case, that even fourth priority claims will be paid. In the instant case, if not for the fact that the Southern Star bankruptcy estate has sufficient assets to pay priority claims, it is doubtful the Petition would be before this Court.

Therefore, the actual facts of this case show that whether or not an insurer has a priority claim following the insured's bankruptcy has absolutely no effect on the insurer's actions in canceling the insured's workers' compensation insurance coverage. Further, such presumed priority status did not get the premiums paid prepetition, did not ensure the continuation of the relationship between Petitioner and Southern Star, and certainly did not allow Southern Star to avoid bankruptcy. Most importantly, allowing priority status to claims like Petitioner's claim confers absolutely no benefit on the employees of the bankrupt company.

Likewise, it is ludicrous to suggest that the status of Petitioner's claim as a priority claim (as well as those similarly situated) would affect an employer's ability to retain employees. It is doubtful that any employees (except for those at the management level) have any knowledge regarding the status of their employer's workers' compensation insurance coverage, as it is not part of their traditional insurance benefits. More importantly, the priority issue only arises following bankruptcy, which in most cases will be a Chapter 7 liquidation where there is no further need for employees. Finally, the idea that affording Petitioner's claim (and those like it) priority status will allow an employer to avoid bankruptcy is a total nonsequitur, and ignores the economic factors that cause bankruptcy filings in the first place. Such factors simply do not include the characterization of creditor claims postpetition.

Essentially, Petitioner is simply seeking a judicial revision of § 507(a)(4) that will benefit no one other than

the workers' compensation insurance industry.[2] As echoed by one bankruptcy court, this was clearly not Congress' goal or intent in enacting § 507(a)(4).

> [T]here is no basis for supposing that Congress adopted § 507(a)(4) as a means of protecting or promoting the solvency of the insurance industry or out of concern that without the § 507(a)(4) priority the industry would be unable to provide the benefits required under policies of insurance covering employees. In fact, neither of the Supreme Court cases which prompted the enactment of § 507(a)(4) involved insurance policies or insurance companies.
>
> In actuality, [the insurer] is in the same boat as all the other unsecured, non-priority creditors who also provided goods and/or services in the belief that the Debtor would continue in business and pay for the goods and services in the ordinary course of business. Neither the rationale behind § 507(a)(4) nor its statutory language requires that [the insurer] be elevated above the other unsecured creditors in this case.

In re The Montaldo Corp., 207 B.R. 112, 117 (Bankr. M.D.N.C. 1997) (citations omitted).

III. The Purported Conflict Among The Decisions Of The Circuit Courts Of Appeals.

While it has been stated that the "most assured way of satisfying the requirement of Supreme Court Rule 19 [now Supreme Court Rule 10] that 'special and important

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[2] This Court itself has warned against judicial legislation. *See Sorenson v. Secretary of Treasury*, 475 U.S. 851, 864, 106 S. Ct. 1600, 1608, 89 L. Ed. 2d 855 (1986); *Crooks v. Harrelson*, 282 U.S. 55, 60, 51 S. Ct. 49, 50, 75 L. Ed. 156 (1930).

[now 'compelling'] reasons' for review exist is to show that the issue sought to be reviewed involves a conflict of decisions among the lower federal courts on a point of federal law," 23 *Moore's Federal Practice* § 510.21[1] at p. 510-14 (Matthew Bender 3d ed.) (quoting Harlan, *Manning The Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 551 (1958)), Rule 10 still requires that such conflict be with regard to an "important" matter. This would indicate that not all conflicts among the circuit courts of appeals will warrant certiorari. Also, it would appear that there has to be, in any event, a true conflict among these federal courts, and not a mere misapplication of the law by a single, dissenting circuit court.

The importance of the question before the Court is not enhanced by the three circuit court of appeals decisions addressing it because the purported conflict among them has been overstated by Petitioner. Petitioner asserts that there is an "irreconcilable conflict" on the "application of section 507" among the Fourth, Sixth, Ninth, Eighth and Tenth circuit courts of appeals. Petition at pp. 7-8. As a threshold matter, Respondent would point out that the Sixth Circuit[3] and Fourth Circuit decisions cited by Petitioner do not involve § 507(a)(4) and are, therefore, irrelevant to this Court's present inquiry.[4] This is exemplified by Petitioner's own statement that these cases

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[3] Petitioner has informed Respondent that the correct cite for the case of *In re Suburban Motor Freight, Inc.* is 998 F.2d 338 (6th Cir. 1993).

[4] Petitioner would have the Court render a decision clarifying every nuance of § 507, despite the fact that the only issue properly before the Court is the narrow issue decided by the Tenth Circuit below. See the discussion in the text *infra* at pp. 22-23.

involve § 507(a)(7) and the lack of discussion of these cases in the Petition. In any event, neither the Sixth Circuit decision nor the Fourth Circuit decision are in conflict with the Eighth Circuit and Tenth Circuit decisions on the instant issue involving § 507(a)(4).[5] In fact, the Fourth Circuit's opinion is in harmony with that of the Eighth Circuit and the Tenth Circuit in a critical respect.

In *New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund*, 886 F.2d 714 (4th Cir. 1989), the Fourth Circuit specifically distinguished workers' compensation insurance from private insurance based on the former's mandatory character, and such distinction provides the primary basis for affording such claims priority as excise taxes.

> It is also to be noted that the West Virginia system features numerous "insurance" characteristics, such as the references to "premiums," the variable premium rates provided, and the option of self-insurance subject to the Commissioner's approval. Nevertheless, the obligation upon employers to provide and pay for workers' compensation coverage is a pecuniary burden placed upon employers by the state. The fact that the funds are raised solely to satisfy workers' compensation claims does not necessarily transform those payments into something other than taxes. Nor does the fact that, under

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[5] Nonetheless it is interesting to note that both the Sixth Circuit and the Fourth Circuit decisions are absolutely silent with respect to § 507(a)(4) despite the fact that the priority characterization of claims for unpaid workers' compensation insurance "premiums" was directly at issue.

> the holding we state in this case, a state agency is given, as an insurer, priority in bankruptcy when a private insurer is not tip the scales against construing the workers' compensation premiums as "excise taxes"; such a difference is really only a "distinction between the sovereign power of the state and the rights of private citizenry."

Id. at 719-20 (citations omitted); *see also id.* at p. 720, n. 6. While the Fourth Circuit was not speaking to § 507(a)(4), the mandatory nature of workers' compensation insurance was likewise a critical factor for both the Eighth Circuit and the Tenth Circuit in denying priority status to such claims under § 507(a)(4). *See In re HLM*, 62 F.3d 224, 226 (8th Cir. 1994); *Southern Star*, 144 F.3d at 716.

Petitioner also contends that the First Circuit's decision in *In re Saco Local Dev. Corp.*, 711 F.2d 441 (1st Cir. 1983) is in conflict with the decisions of the Eighth Circuit and the Tenth Circuit. However, while *Saco* did involve the interpretation of § 507(a)(4), it did not involve workers' compensation insurance but rather an employer's master insurance plan which included group life, health and disability insurance. *See id.* at 442. Assuming *arguendo* this Court views *Saco* as relevant to the instant inquiry, the First Circuit's decision therein is not in conflict with the Eighth Circuit and Tenth Circuit decisions.[6] Petitioner misreads *Saco* when it asserts that the First Circuit rejected the notion that § 507(a)(4) requires a wage substitute or fringe benefit.

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[6] In its decision in *Southern Star*, the Tenth Circuit expressly stated that its opinion was not in conflict with the First Circuit's *Saco* opinion. *See* 144 F.3d at 716-17.

The two issues before the *Saco* Court were: (1) whether the § 507(a)(4) priority was limited to "benefits" the employer was contractually obligated to provide through some formal agreement with the employees, and (2) whether the priority was limited to claims of employees themselves and not the insurers. *See Saco*, 711 F.2d at 448-49. The First Circuit held that a formal agreement to provide the "benefit" was not necessary and that insurers could obtain the priority for premiums. *See id.* However, the First Circuit did **not** reject the notion that the § 507(a)(4) priority is limited to fringe benefits or wage substitutes. Further, the *Saco* decision does not support the broad reading of § 507(a)(4) sought by Petitioner. In fact, the First Circuit in commenting on the statute's legislative history, is actually in agreement with the Eighth and Tenth Circuits regarding the requirement of a fringe benefit or wage substitute. "Congress' object in enacting § 507(a)(4) was to extend the 1898 Act's wage priority to new forms of **compensation**, such as insurance and other **fringe benefits**." *Id.* at 449 (emphasis added).

A. The Tenth Circuit Decision – The Southern Star Case

In *Southern Star*, the Tenth Circuit held that a claim for unpaid workers' compensation insurance premiums is not entitled to priority under § 507(a)(4). *Southern Star*, 144 F.3d at 717. The Tenth Circuit began its analysis by affirming the basic tenet of bankruptcy law that statutory priorities are to be narrowly construed. *See Southern Star*, 144 F.3d at 714. While the Tenth Circuit recognized that the Bankruptcy Code fails to define the critical phrase, "contributions to an employee benefit plan," the court

declined to read the ERISA definition of "employee benefit plan" into the Bankruptcy Code because this definition was designed to effectuate the purpose of ERISA and not the Bankruptcy Code. *Id.* Further, the Tenth Circuit found to do so would impermissibly broaden the § 507(a)(4) priority in a manner "contrary to the tenet that priorities are to be narrowly construed." *Id.*

As its first step in interpreting § 507(a)(4), the Tenth Circuit found that the phrase "contributions to an employee benefit plan" is ambiguous and, therefore, resort to the statute's legislative history is necessary. *See id.* at 715.

> The Supreme Court has held that the wage priority does not extend to fringe benefits, such as pension fund or health insurance contributions. When the wage priority was last amended in 1926, perhaps the intent of Congress was not to extend it in that fashion, because fringe benefits were little heard of at the time. Now, however, to ignore the reality of collective bargaining that often trades dollars for fringe benefits does a severe disservice to those working for a failing enterprise.
>
> In recognition of the changes since 1926, the bill . . . establishes a new category, a fourth priority immediately following the wage priority, for contributions and payments to employee benefit plans. This will include health insurance programs, life insurance plans, pension funds, and **all other forms of employee compensation**

> **that is not in the form of wages** (emphasis added).[7]

Id. (citing H.R. Rep. No. 95-595, at 187 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6148 (footnotes omitted). The legislative history further provides as to § 507(a)(4):

> Paragraph (4) overrules *United States v. Embassy Restaurant*, 359 U.S. 29, 79 S.Ct. 554, 3 L.Ed.2d 601 (195[9]), which held that fringe benefits were not entitled to wage priority status. The bill recognizes the realities of labor contract negotiations, under which wage demands are often reduced if adequate fringe benefits are substituted. The priority granted is limited to claims for contributions to employee benefit plans such as pension plans, health or life insurance plans, and others, arising from services rendered after the earlier of one year before the bankruptcy case and the date of cessation of the debtor's business.

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[7] Conspicuously absent from the legislative history is any mention of workers' compensation insurance. The 1934 amendment to the Bankruptcy Act actually provided a seventh priority for workers' compensation claims; however, four years later, Congress abolished the priority status of these claims. *See United States v. Embassy Restaurant, Inc.*, 359 U.S. 29, 79 S. Ct. 554, 3 L. Ed. 2d 601, 603-05 (1959). Therefore, Congress is well aware of workers' compensation insurance and can choose to explicitly include premiums for such in § 507(a)(4) if it chooses. Had Congress intended the statute to extend to claims for workers' compensation insurance premiums, it would have been made clear by the statute (which it is not) or set forth in the legislative history (which it is not).

Id. at 715-16 (citing H.R. Rep. No. 95-595, at 357 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 (footnotes omitted); *see also* S. Rep. No. 95-989, at 69 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5855.

Upon a review of the above-quoted portions of § 507(a)(4)'s legislative history, the Tenth Circuit found that "the legislative history clarifies that § 507(a)(4) grants priority for 'fringe benefits' accepted in lieu of wages." *Id.* at 715. The Tenth Circuit also found that Congress enacted § 507(a)(4) to **benefit employees not employers.** *See id.* at 716. Consequently, the Tenth Circuit found that workers' compensation coverage could not possibly be a fringe benefit or wage substitute contemplated by § 507(a)(4).

> Workers' compensation coverage . . . is not a fringe benefit that an employee can bargain for, either explicitly or implicitly, in lieu of higher wages. It is not a fringe benefit or wage substitute, as contemplated by Congress in enacting § 507(a)(4). In addition, the legislative history indicates that workers' compensation is not an employee benefit plan because the coverage benefits the employer at least as much, if not more, than the employee. As both the Bankruptcy Court and the BAP recognized, "since workers' compensation premiums are required to meet an obligation imposed by the state, they were primarily for Southern Star's benefit, not its employees."[8]

Id.

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[8] Oklahoma's workers' compensation scheme is a compromise between workers and employers. Workers give up the right to sue for damages for work-related injuries and

B. The Eighth Circuit Decision – The HLM Case

In *HLM*, the Eighth Circuit held that unpaid workers' compensation insurance premiums are not entitled to priority under § 507(a)(4).[9] *In re HLM Corp.*, 62 F.3d 224, 227 (8th Cir. 1995). In doing so, the Eighth Circuit opinion substantially adopts the reasoning of the bankruptcy court and the district court below on two primary points. *See id.* at 225.[10] First, the Eighth Circuit confirmed that premiums for workers' compensation insurance are not wage substitutes because of their mandatory nature; "employers cannot offer (and employees cannot accept)

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employers give up certain defenses, i.e., the "fellow servant rule." *See generally Carroll v. District Court*, 579 P.2d 828 (Okla. 1978) and *Brooks v. A.A. Davis & Co.*, 124 Okla. 140, 254 P. 66 (1926). Therefore, in Oklahoma as elsewhere, the workers' compensation scheme benefits the employer at least as much as it benefits the employees.

[9] Petitioner asserts that this holding was expressly limited by the Eighth Circuit to Minnesota's workers' compensation scheme. Respondent disagrees. The holding in *HLM* reads as follows, "[w]e conclude that unpaid pre-petition premiums under Minnesota's workers' compensation scheme do not constitute 'contributions to an employee benefit plan,' and thus do not support [the insurer's] claimed priority status under § 507(a)(4) of the Bankruptcy Code." 62 F.3d at 227. Notwithstanding the foregoing, there is no indication by the Eighth Circuit that their holding is so limited. Moreover, if the Eighth Circuit intended to limit the holding to Minnesota law, there would have been no need to criticize the Ninth Circuit's opinion as 'excessively broaden[ing] the reach of the Code language in question." *Id.*

[10] The bankruptcy court decision is reported in *In re HLM Corp.*, 165 B.R. 38 (Bankr. D. Minn. 1994) and the district court decision is reported in *Employers Ins. of Wausau v. Ramette (In re HLM Corp.)*, 183 B.R. 852 (D. Minn. 1994).

higher wages as a substitute for workers' compensation benefits." *Id.* at 226. Second, the Eighth Circuit agreed that the "contribution" of workers' compensation insurance premiums does not "benefit" employees within the meaning of "employee benefit plan" because it is primarily the employer and not the employee who benefits. *See id.*

In the *HLM* cases, the Eighth Circuit, the District Court and the Bankruptcy Court all agreed on the ultimate holding. However, it should be noted that the courts varied in the degree of reliance they placed on the "plain language" of § 507(a)(4) versus the legislative history. In holding that workers' compensation insurance premiums are not entitled to fourth priority status under § 507(a)(4), the *HLM* Bankruptcy Court construed the plain meaning of the language of this statute, and articulated the following reasons for its holding: (1) the employer/debtor's payment of premiums to a workers' compensation insurance carrier is not a "contribution" to an employee benefit plan because the term "contribution" implies a voluntary act and workers' compensation insurance is statutorily mandated; (2) workers' compensation insurance is not a "plan" because a "plan" is typically a mechanism for an employer to compensate employees in ways other than wages and workers' compensation insurance is a "statutorily mandated system to spread the risks of work-related injuries"; (3) the payment of workers' compensation insurance premiums does not "benefit" the employees as the term "employee benefit plan" logically suggests but instead "benefits" the employer as it is the employer who is insured from its statutory liability to provide workers' compensation benefits; (4) § 507(a)(4) requires that the priority claim arise from a "service"

rendered 180 days prior to the bankruptcy filing and a claim for unpaid workers' compensation insurance premiums does not arise from a "service" but from the debtor's failure to pay its insurance carrier. *HLM*, 165 B.R. at 40-41. The *HLM* Bankruptcy Court concluded that the plain meaning of § 507(a)(4) clearly illustrates that unpaid workers' compensation insurance premiums are not contributions to an employee benefit plan, and also found that the legislative history of § 507(a)(4) supported this conclusion.

> Section 507(a)(4) was included in the Code to overrule *United States v. Embassy Restaurant*, 359 U.S. 29, 79 S.Ct. 554, 3 L.Ed.2d 601 (1958) [sic] and *Joint Industry Board v. United States*, 391 U.S. 224, 88 S.Ct. 1491, 20 L.Ed.2d 546 (1968) which held that fringe benefits were not entitled to wage priority status. The theory behind § 507(a)(4) is that, in the realities of collective bargaining agreement negotiations, employees may give up certain claims for wages in exchange for fringe benefits. As a result, the fringe benefits earned 180 days before the filing of a bankruptcy petition should be entitled to priority *in the same way and for the same reason that wages are entitled to priority* (citations omitted). The legislative history makes it clear that § 507(a)(4) covers those types of benefits that typically are bargained for in the employer-employee setting whether as part of a collective bargaining arrangement or otherwise. *Workers' compensation is not a bargained for benefit. Rather, it is a statutorily mandated system of imposing liability on an employer for an employee's injuries arising out of the workplace.*

Id. at 41 (emphasis added).

The *HLM* District Court affirmed the *HLM* Bankruptcy Court's holding, but focused primarily on the legislative history of the statute, and concluded that an employer's workers' compensation premium payments are not wage substitutes and, therefore, are not entitled to a fourth priority. *See HLM*, 183 B.R. at 857. The *HLM* District Court concluded that the plain language of § 507(a)(4), as well as the legislative history of the statute, demonstrate that contributions to an "employee benefit plan" are not the same as employer's workers' compensation premium benefits. *See id.* at 856. The *HLM* District Court further found that this construction of the statute was consistent with the purposes of the Bankruptcy Code.

> Section 507(a)(4) was adopted specifically to place non-monetary compensation owed by a debtor to its employees on the same level as wage compensation. As discussed, workers' compensation insurance payments are not a wage substitute. More generally, the Code was promulgated to ensure the fair and uniform treatment of creditors. To that end, preferential treatment is given to unsecured creditors only in exceptional circumstances. [The insurer] has provided no compelling reason to show why funds should be taken from [the debtor's] other unsecured creditors and given to it.

Id.

The Eighth Circuit opinion begins with the observation that the Bankruptcy Code does not define the phrase "contributions to an employee benefit plan" but recognizes that the legislative history is "instructive and illuminating." *HLM*, 62 F.3d at 225. Therefore, while not entirely clear, it would appear that the Eighth Circuit

found the language of § 507(a)(4) ambiguous and thought reference to the legislative history was necessary. In fact, the Eighth Circuit opinion expressly indicates that both the *HLM* Bankruptcy Court and the *HLM* District Court were satisfied that their respective holdings were consistent with **both** the language of § 507(a)(4) and its legislative history. *HLM*, 62 F.3d at 225-26.

C. The Ninth Circuit Decision – The Plaid Pantries Case

The Ninth Circuit rendered the first circuit court of appeals decision on the priority status to be afforded unpaid workers' compensation insurance premiums in *Employers Ins. of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir. 1993).[11] In analyzing § 507(a)(4), the Ninth Circuit correctly recognizes that the statute was enacted by Congress to overrule this Court's two opinions holding that fringe benefits were not entitled to wage priority status, to-wit: *Joint Indust. Bd. v. United States*, 391 U.S. 224, 88 S. Ct. 1491, 20 L. Ed. 2d 546 (1968) and *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29, 79 S. Ct. 554, 3 L. Ed. 2d 601 (1959). *See id.* at 607. The Ninth Circuit also correctly finds that § 507(a)(4) was enacted to "provide a level of priority for 'fringe benefits' " and "to include forms of contribution not contemplated in the

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[11] Although the Ninth Circuit does not cite it or rely on it, the first and only other published opinion on this issue at the time of the *Plaid Pantries* decision was *In re AOV Industries, Inc.*, 85 B.R. 183 (Bankr. D.C. 1988), which is in accord with the Ninth Circuit holding.

1898 Act." *Id.*[12] Notwithstanding, the Ninth Circuit holds that unpaid workers' compensation insurance premiums are entitled to priority under § 507(a)(4) as a "contribution to an employee benefit plan." *See id.* The Ninth Circuit reasoned that the workers' compensation system is designed to benefit employees and that such benefits are indirectly a form of compensation in exchange for labor. *See id.* at 607.

In rendering its holding, the Ninth Circuit specifically rejected as irrelevant any distinction between statutorily-mandated insurance programs, such as workers' compensation insurance, and contractually-based insurance programs, such as health and life insurance voluntarily provided by employers to employees. *See id.* Further, the Ninth Circuit held that the "benefits" involved need not be "wage substitutes" in order to fall within the priority of § 507(a)(4). *See id.*

D. There Is No Meaningful And Important Conflict Among The Circuit Courts.

This Court's Rule 10 requires that there be compelling reasons for review on certiorari. Even where there

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[12] Oddly enough, however, despite the fact that the Ninth Circuit apparently resorts to the legislative history of § 507(a)(4), it barely discusses the legislative history, other than to state that "[it] was added to overrule those two cases and to provide a level of priority for 'fringe benefits' and "[it] expanded the priorities to include contributions to 'employee benefit plans,' forms of contribution not contemplated in the 1898 Act." *Plaid Pantries*, 10 F.3d at 607. Conspicuously absent from its discussion of the legislative history, are the various clear statements regarding Congress' intent that the fourth priority be **limited** and that it cover **wage substitutes.**

may be a conflict between the decisions of two or more circuit courts of appeals, the conflict must be with regard to an "important" matter, and there still must be compelling reasons for review. Respondent respectfully submits that the conflict between the Ninth Circuit on the one hand and the Eighth Circuit and Tenth Circuit on the other hand does not satisfy the requirements of Rule 10.

Petitioner summarily argues that there is an irreconcilable conflict between the Ninth Circuit, the Eighth Circuit and the Tenth Circuit, because the Ninth Circuit has held that a claim for unpaid workers' compensation insurance premiums is entitled to priority under § 507(a)(4) and the Eighth Circuit and the Tenth Circuit have held such a claim is not entitled to priority. Petitioner attempts to "broaden" the conflict by asserting that there are "4 critical questions which must be addressed before this issue can be completely resolved," to-wit: (1) the use of the ERISA definition of "employee benefit plan" in interpreting § 507(a)(4); (2) the applicability of § 507(a)(4) to non-employee third parties; (3) whether benefits must be directly bargained for under § 507(a)(4); and (4) whether there is a valid distinction between workers' compensation insurance and other types of insurance. Petition at p. 15.

While it is of course true that the Ninth Circuit's holding is in conflict with the holdings of the Eighth Circuit and the Tenth Circuit, a careful reading of the three courts' opinions reveals that **the actual issue in conflict** is much more narrow. All three courts are in agreement that resort to the legislative history is necessary, and all three courts agree that the legislative history shows that § 507(a)(4) was enacted to provide a priority for "fringe benefits." The critical disagreement among the

circuit courts is whether or not workers' compensation insurance coverage is a "fringe benefit." Arguably, this "fringe benefit" issue is encompassed by Petitioner's "fourth issue" above.[13]

Under the circumstances, Respondent respectfully submits that the conflict as to the "fringe benefit" issue is not sufficiently material and important to warrant this Court's review on certiorari. As the single opinion in disagreement with two other circuit courts' opinions, the circumstances surrounding and the character of the *Plaid Pantries* opinion are both appropriate factors to consider. It is important to note that the Ninth Circuit rendered the first circuit court of appeals decision on the priority status to be afforded unpaid workers' compensation insurance premiums under § 507(a)(4). Surprisingly, however, the brevity of the opinion almost renders it a summary opinion. It is also relevant that the Eighth Circuit in *HLM* and the Tenth Circuit in *Southern Star* disagreed with the

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[13] However, the other three "issues" posited by Petitioner are simply not in conflict among the circuit courts of appeals. As to the "ERISA definition," in *Plaid Pantries*, the Ninth Circuit expressly declines to reach the issue. *See Plaid Pantries*, 10 F.3d at 607. With respect to the "third party claimant" issue, the Eighth Circuit opinion in *HLM* is silent on this issue and the Tenth Circuit expressly declines to reach the issue in *Southern Star*. *See Southern Star*, 144 F.3d at 717, n. 6. Likewise, there is no conflict between the three circuit courts as to a requirement under § 507(a)(4) that wage substitutes be the result of direct bargaining or formal agreement, as none of the opinions expressly address the issue. In *Southern Star*, the Tenth Circuit discusses the fact that this issue was decided by the First Circuit in *Saco*. *See id*. However, the Tenth Circuit then concludes that its decision is not in conflict with *Saco*. The opinions in *Plaid Pantries* and *HLM* are both silent on the issue.

Ninth Circuit's holding in *Plaid Pantries* because the holding had the impermissible effect of interpreting bankruptcy priorities broadly, rather than narrowly. *See HLM*, 62 F.3d at 227; *Southern Star*, 144 F.3d at 716.

Finally, it is significant that not one court has adopted the holding of the Ninth Circuit in *Plaid Pantries* since the Eighth Circuit entered its ruling in *HLM*.[14] Conversely, five courts in three different bankruptcy cases have rendered the same holding as the Eighth Circuit, to-wit: *In re Southern Star Foods, Inc.*, 144 F.3d 712 (10th Cir. 1998), *aff'g*, 210 B.R. 838 (Bankr. 10th Cir. 1997), *aff'g*, 201 B.R. 291 (Bankr. E.D. Okla. 1996); *In re Birmingham Nashville Express, Inc.*, 221 B.R. 194 (Bankr. M.D. Tenn. 1998); *In re Allentown Moving & Storage, Inc.*, 208 B.R. 835 (Bankr. E.D. Pa. 1997), *aff'd*, 214 B.R. 761 (E.D. Pa. 1997). This last factor alone would seem to militate in favor of denying the Petition. This Court has said, "in the absence of compelling reason, we should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute." *Rice v. Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897, 903 (1955).

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[14] Petitioner states that *In re Braniff, Inc.*, 218 B.R. 628 (Bankr. M.D. Fla. 1998) holds that claims for workers' compensation insurance premiums are entitled to priority status under § 507(a)(4). However, this case did not involve a claim for workers' compensation insurance premiums, rather it involved a claim under a group health and life insurance policy. The court was interpreting § 507(a)(4)(B)(ii) in order to quantify the health and life insurer's claim. Therefore, its holding that a government mandated insurance program (i.e., workers' compensation) is included in the definition of "employee benefit plan" is distinguishable.

One commentator, in discussing a conflict among the circuit courts as a ground for certiorari, has stated:

> [T]he nub of all these qualifications is that a conflict of decisions may safely be relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved by the Supreme Court alone, and that the disagreement among the lower courts is one that should promptly be dissolved.

23 *Moore's Federal Practice*, § 510.21[2] at p. 510-16 (Matthew Bender 3d ed.) (quoting Harlan, *Manning The Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958)).

In the instant case, the timing of the Ninth Circuit decision in *Plaid Pantries* and the decisions that have followed it are significant in assessing the importance of the conflict. The fact that the Ninth Circuit rendered the first decision on this issue, and it was followed by two other circuit court opinions to the contrary, evidences that the likelihood of future impact from the *Plaid Pantries* decision is small. Moreover, the scant case law on this issue also indicates that the issue does not arise with much frequency. There is simply no compelling reason why such minimal conflict can be resolved only by review on certiorari by this Court. To the contrary, the circuit courts should be allowed to further consider the question presented to see if they perceive an ongoing and material conflict.

IV. Misapplication of Law

In 1995, Rule 10 was amended and the last sentence of Rule 10, setting out two circumstances under which the Court rarely grants review on certiorari, was added. It

provides that a petition for certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law. These changes appear to have had the purpose of narrowing the grounds pursuant to which certiorari is granted. It would appear that the reasoning behind this change was that the Court, in a need to limit its docket, should review only true conflicts in the interpretation of the law, not its application.

The brevity and summary nature of the *Plaid Pantries* decision makes it difficult to determine how the Ninth Circuit reached its holding that claims for unpaid workers' compensation insurance premiums are entitled to priority under § 507(a)(4). This determination is difficult because the Ninth Circuit's initial interpretation of the statute, when viewed in the context of the legislative history, is correct.

> In 1978, Section 507(a)(4) was added to the Bankruptcy Code in order to overrule those two cases and to provide a level of priority for "fringe benefits." The statute expanded the priorities to include contributions to "employee benefit plans," forms of contribution not contemplated in the 1898 Act. It "recognize[d] the realities of labor contract negotiations, under which wage demands are often reduced if adequate fringe benefits are substituted."

Plaid Pantries, 10 F.3d at 607 (citations omitted).

Notwithstanding the Ninth Circuit apparently then determined that workers' compensation insurance is a "fringe benefit."

> The workers' compensation system is designed to provide benefits to victims of work related injuries. Those benefits are generally funded by

> insurance, the premiums for the insurance are paid by the employers, and the costs are passed on in the form of lower wages and higher prices. Those benefits are a form of compensation offered to workers in exchange for the labor that they perform.

Id. Therefore, it may be reasonable to conclude that the Ninth Circuit's holding is more the result of its misapplication of the term "fringe benefit" than its misinterpretation of § 507(a)(4).[15]

Further, it would appear that the Ninth Circuit misapplied general bankruptcy law principles regarding priority claims. Generally, the granting of a priority in bankruptcy requires a "clear expression of Congressional intent." *See In re P.J. Nee Co.*, 36 B.R. 609, 611 (Bankr. D. Md. 1983) (citing *In re Lorber Indus. of California*, 675 F.2d 1062, 1068 (9th Cir. 1982)). Because there is a presumption in bankruptcy cases that the debtor's resources will be

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[15] A claim for workers' compensation insurance premiums does not fit any common meaning of the term "fringe benefit." Black's Law Dictionary defines "fringe benefits" as "side benefits which accompany or are in addition to a person's employment such as paid insurance, recreational facilities, profit-sharing plans, paid holidays and vacations, etc. Such benefits are in addition to regular salary or wages and are a matter of bargaining in union contracts." *Black's Law Dictionary* 601 (5th ed. 1979). Webster's Ninth New Collegiate Dictionary defines "fringe benefits" in similar fashion as "an employment benefit (as a pension, a paid holiday, or health insurance) granted by an employer that involves a money cost without affecting basic wage rates." *Webster's Ninth New Collegiate Dictionary* 494 (1983). These definitions show that "fringe benefits" are wage substitutes.

equally distributed among his or her creditors, statutory priorities are to be narrowly construed. *See Joint Indus. Bd. v. United States*, 391 U.S. 224, 228, 88 S. Ct. 1491, 20 L. Ed. 2d 546 (1968); *In re Amarex*, 853 F.2d 1526, 1530 (10th Cir. 1988) (citing *Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 100 (2d Cir. 1986)); *In re Olga Coal Co.*, 194 B.R. 741, 745 (Bankr. S.D.N.Y. 1996); *In re HLM Corp.* 183 B.R. 852, 854 (D. Minn. 1994). Additionally, if one claimant is to be preferred over other claimants, the purpose needs to be clear from the statute. *See Nathanson v. NLRB*, 344 U.S. 25, 29, 73 S. Ct. 80, 83, 97 L. Ed. 23 (1952); *Matter of Jartran, Inc.*, 732 F.2d 584, 586 (7th Cir. 1984); *Olga Coal*, 194 B.R. at 745. In the instant case, the Ninth Circuit's holding results in an extremely broad reading of § 507(a)(4). This was exactly the criticism of the *Plaid Pantries* decision voiced by both the Eighth Circuit and the Tenth Circuit.

On the other hand, the Tenth Circuit correctly interpreted and applied the requirements of § 507(a)(4). The legislative history of § 507(a)(4) provides that § 507(a)(4) was enacted to specifically overrule two of this Court's cases which held that contributions to a union-sponsored employee benefit plan did not constitute wages entitled to priority status under the Bankruptcy Code's priority statute in existence at that time. In the Congressional Reports, it is clear that § 507(a)(4) was enacted by Congress to provide a "fringe benefit" analog to the wage priority of § 507(a)(3). The express language of the legislative history refers to "fringe benefits" as a *substitute* for wages and provides that § 507(a)(4) is to be *limited*. This interpretation comports with the requirement that priorities be construed narrowly and is consistent with the fact that § 507(a)(4) was intended to overrule cases which

dealt with traditional fringe benefits. Further, the legislative history explains that the phrase "contributions to an employee benefit plan" is intended to **only** encompass forms of employee compensation that are not in the form of wages.

A claim for workers' compensation insurance premiums does not fit any common meaning of the term "fringe benefit." Such a claim cannot possibly constitute a contribution by an employer to a compensation plan intended for the benefit of employees and as a substitute for additional wages. Rather, it arises from a statutory mandate to spread the risks of work-related injuries, and by its very nature, is more of a benefit to the employer than the employee. If the employer secures workers' compensation insurance, it is insured from its statutory liability to its employees. The employer is the insured, not the employees. However, even if the employer is uninsured, the employer must provide its employees with workers' compensation benefits. In the instant case, Southern Star's employees' workers' compensation claims were to be satisfied by Petitioner, regardless of whether Southern Star paid the premiums.

The Tenth Circuit rendered its decision in the context of the well settled bankruptcy law on priorities. The intent to grant a priority has to be clear and, subsequently, priorities are to be narrowly construed. The Tenth Circuit also rendered its decision within the context of the Bankruptcy Code's general purpose of fair and uniform treatment of creditors. As the many courts who are in agreement with the Tenth Circuit's holding have recognized, there is simply no compelling reason to favor claimants such as Petitioner and give them preferential treatment to the detriment of a bankrupt debtor's other

unsecured creditors. To allow priority to an insurer for a claim for unpaid workers' compensation insurance premiums goes beyond the Congressional intent and does violence to the policy and purpose behind the priority statute, as well as the Bankruptcy Code in general. The statutory language and the legislative history of § 507(a)(4), especially within the foregoing context, correctly resulted in the Tenth Circuit's decision holding that Petitioner's claim is not entitled to priority under § 507(a)(4).

CONCLUSION

Based on the foregoing, Respondent, Kenneth G.M. Mather, as trustee of the bankruptcy estate of Southern Star Foods, Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari of Petitioner, The State Insurance Fund.

Respectfully submitted,

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